Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

DAMON WILSON,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of Georgia

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. DOES A TRIAL COURT VIOLATE A DEFENDANT'S FOURTH AMENDMENT RIGHTS BY ABANDONING THE TOTALITY OF THE CIRCUMSTANCES ANALYSIS FOR THE WARRANTLESS STOP OF AN AUTOMOBILE WHEN IT IGNORED THE DETAINING OFFICER'S OPINION THAT THE SOURCE OF INFORMATION UPON WHOM SAID OFFICER RELIED IN STOPPING THE VEHICLE WAS NOT WORTHY OF BELIEF AND FAILING TO EXAMINE THE NATURE OF THE INFORMATION CONTAINED IN THE TIP?

II. WHEN AN APPELLATE COURT REVIEWS A MOTION TO SUPPRESS EVIDENCE DISCOVERED DURING A WARRANTLESS STOP BASED SOLELY ON INFORMATION GIVEN TO POLICE FROM A KNOWN INFORMANT WHOM POLICE DID NOT CONSIDER RELIABLE, SHOULD THE APPELLATE COURT REVIEW THE TRIAL COURT'S FINDING, THAT SAID INFORMANT WAS RELIABLE, ON A DEFERENTIAL STANDARD, OR SHOULD THE APPELLATE COURT BE COMPELLED TO TAKE THE MATTER ON PLENARY REVIEW?

LIST OF PARTIES TO THE PROCEEDINGS BELOW

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Damon Wilson
Owen Vogelson (Superior Court only)

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REPORT OF THE OPINION OF THE GEORGIA SUPREME COURT

The order of the Georgia Supreme Court denying certiorari, filed October 1, 2001, is unreported. (App. 9).

STATEMENT OF SUPREME COURT JURISDICTION

Petitioner was convicted after a bench trial on July 14, 2000. On May 9, 2001, the Georgia Court of Appeals affirmed the trial court's decision to deny Petitioner's Motion to Suppress. On October 1, 2001, the Georgia Supreme Court denied the Petition for Certiorari. (App. 9).

This Court's jurisdiction to review the denial of certiorari by the Georgia Supreme Court and the denial of Petitioner's motion to suppress by the trial court and the Georgia Court of Appeals is conferred by 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE

Amendment IV. Security from unwarrantable search and seizure

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be

searched, and the persons or things to be searched.

Amendment XIV. Section 1. Citizenship rights not to be abridged by States

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

STATEMENT OF PROCEEDINGS AND DISPOSITION

During the July, 1999, term, the DeKalb County, Georgia, grand jury indicted Petitioner for one count of "trafficking in cocaine," one count of "possession of marijuana with intent to distribute," one count of "possession of cocaine with intent to distribute," and one count of "possession of a firearm during the commission of a crime" in violation of the laws of the State of Georgia. *See* O.C.G.A. §§ 16-13-31, 16-13-30 and 16-11-106. The Superior Court for DeKalb County, Georgia, Castellani, J. presiding, held a hearing on Petitioner's motion to suppress on October 20, 1999 and Petitioner filed a brief in support of his motion on October 21, 1999. On October 22, 1999, the court issued its order denying Petitioner's motion to suppress. (App. 7-8).

After a bench trial in the Superior Court of DeKalb County, Georgia, on July 14, 2000, Petitioner was convicted of counts two and three of the indictment: "possession of cocaine with intent to distribute" and "possession of marijuana with intent to distribute." Petitioner was sentenced to two concurrent sentences of seven years to serve in prison. (App. 1).

The Georgia Court of Appeals docketed Petitioner's appeal of the trial court's denial of his motion to suppress on August 21, 2000. On May 9, 2001, the Court of Appeals affirmed the trial court's decision to deny Petitioner's motion to suppress. (App. 1).

Petitioner filed his Notice of Intention to Apply for Certiorari with the Georgia Court of Appeals on May 14, 2001. Petitioner's Petition for Certiorari was docketed by the Georgia Supreme Court on May 31, 2001. On October 1, 2001, the Georgia Supreme Court denied the Petition for Certiorari. (App. 9).

STATEMENT OF FACTS

On April 26, 1999, Detective R.L. Franklin of the DeKalb County Police Department's COBRA Unit, "a street level drug enforcement division of the uniform [police]," which "target[s] street level drug violations, prostitution, crime prevention," received a cellular phone call from a confidential source regarding the movement of drugs within the County. (App. 12). Franklin's source indicated that there was a white Jeep Cherokee, early to mid-'90's model, with a license tag number 324 JLC and was in the designated area of Redan Road and Covington

Highway contemporaneously with their conversation. (App. 28). The source further indicated with uncertainty that the occupants of the vehicle would be male – "black or white, probably black males." (App. 30).

The Jeep was in the designated area at the moment Franklin was receiving the tip. The source did not indicate the Jeep's destination or the direction in which the Jeep might be traveling, nor did the source identify the driver or his passenger by name. (App. 28, 30-31). Franklin did not ask the basis of the source's knowledge, nor did he ask if the information came from his personal knowledge. (App. 31). Franklin explained that, at the time he received the tip, he considered the individual from whom he received the information to be a "confidential source," as opposed to a reliable informant. (App. 22). Franklin distinguished a "confidential source" from a reliable informant by indicating that he considered a "source" to be unreliable, thereby requiring any information which he provided to be verified. (App. 22). Franklin indicated that the fact that the source had given him information in the past did not deter his belief that the source had not previously provided him with information of a quality that he felt comfortable acting upon it without prior verification. (App. 22).

At an earlier point in the proceedings, the State had asked Franklin whether the information the "source" had provided previously was "reliable." (App. 13-14). Upon Defendant's objection that the question called for an impermissible conclusion, the Court stated, "[o]verrule the objection. He's an officer and has at least three years of experience to make that evaluation." (App. 14).

Within minutes of receiving the tip, Franklin arrived at the designated area and observed a white Jeep Cherokee, bearing the Georgia tag 324 JLC. (App. 16-17). He observed the driver, a black male, and surmised that there was another male passenger, although he did not actually observe one. (App. 17).

Franklin contacted uniformed DeKalb Strike Force Detectives Becker and Frank and instructed them to stop the vehicle. (App. 18). Franklin did not share with the detectives the information he had received from his source, but only provided them with a description of the vehicle, a location where the vehicle was and a description of its occupants. (App. 35).

Prior to the stop, Franklin testified the driver of the Jeep committed no moving violations. (App. 31). Then, having initiated the stop, Becker used his PA system to instruct its driver, Petitioner, to exit and proceed to the rear of the vehicle. Petitioner complied. At this point, Petitioner was not free to go, nor was he advised of his rights. (App. 60).

After several questions regarding ownership of the Jeep and insurance, Becker asked Petitioner whether he had a gun in the vehicle. (App. 37). Petitioner responded affirmatively. (App. 37). At no point did Becker make inquiry as to drugs in the vehicle or ask for permission to search it. (App. 33). Becker then inquired as to the gun's location in the vehicle and Petitioner responded that it was located under the driver's seat. (App. 37-38). After searching the vehicle for a weapon, Becker discovered suspected marijuana and cocaine. (App. 38, 43).

Based upon the foregoing facts, Petitioner brought a motion to suppress in the Superior Court for DeKalb County, Georgia, Castellani, J. presiding. The Court denied Petitioner's motion, based on the Court's conclusion that Franklin's source was a reliable, confidential informant whose information, coupled with Petitioner's driving method, warranted the police stop of his vehicle. (App. 8).

The Georgia Court of Appeals ("Court of Appeals") affirmed the denial of Petitioner's Motion to Suppress. Although it held that "[Petitioner]'s method of driving did not support the trial court's decision to deny his motion to suppress," it held that the "detailed information given by the reliable informant," did provide a "founded suspicion" of criminal activity and provided a legal basis for the stop. (App. 6). The Georgia Supreme Court denied Petitioner's application for a writ of certiorari to the Court of Appeals. (App. 9).

Petitioner appeals the trial court's denial of the Motion to Suppress, the Court of Appeals's affirmation of said denial and the Georgia Supreme Court's denial of certiorari.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT OF CERTIORARI

I. Certiorari is warranted because the Georgia Court of Appeals effectively eliminated the reasonable suspicion analysis for determining the constitutionality of the warrantless stop of an automobile by affirming the trial court's determination that police have the right to conduct a stop based on information from an individual who was not considered reliable by the detaining officer.

It is well established that police may conduct an investigatory stop under the Fourth Amendment if supported by reasonable suspicion. *See generally Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L.Ed.2d 889 (1968). Thereafter, if supported by probable cause, police may conduct a warrantless search of an automobile. *See generally California v. Acevedo*, 500 U.S. 565, 111 S. Ct. 1982, 114 L.Ed.2d 619 (1991). In limited circumstances, discussed more thoroughly, *infra*, reasonable suspicion to conduct a *Terry* stop may arise from information provided by a reliable, confidential informant. *See Alabama v. White*, 496 U.S. 325, 110 S. Ct. 2412, 110 L.Ed.2d 301 (1990).

During the Defendant's motion to suppress hearing, the following exchange took place on direct examination of Franklin, the detaining officer, by the State:

> Q. Was the information that [Franklin's confidential source] gave you on each of those other cases, was it reliable? I mean, was it reasonably true as to what you actually found?
>
> [Counsel for Defendant]: I will object to that question. That is asking him to make a conclusion. I think he is capable of testifying

> what information was shared with him and what the result was. The questions that have been asked prior to this time don't link up the question that was just asked.
>
> The Court: Overrule the objection. He's an officer and has at least three years of experience to make that evaluation. (App. 13-14).

Thus, the trial court found, nearly at the outset of the motion to suppress hearing, that Franklin's testimony regarding his knowledge of the informant's reliability was both competent and credible. As Franklin's testimony continued, he alluded to two previous occasions where his source had provided information that had led to arrests and/or the seizure of contraband. (App. 13).

On cross-examination, Defendant's counsel explored Franklin's characterization of the individual who had provided Franklin with the information that led to the stop of the vehicle Defendant was driving. Whereupon the following colloquy between Franklin and Defendant's counsel occurred:

> Q. Now, you indicated in your direct testimony that you received information from a confidential informant, correct?
>
> A. From a confidential source.
>
> Q. What's the difference between – to you between a source and an informant?
>
> A. A confidential informant is a person – or a source of information that has been established over a period of time and is deemed by me to be reliable without any need to, with direct investigation, to verify the information that has been given to me.

> I label the confidential source, *without the term of reliable,* because if I receive information from the confidential source I take initiative by independent investigation to attempt to verify the information given to me.
>
> Q. And this gentleman in this case was a confidential source?
>
> A. That's correct.
>
> Q. So, when you received the information from him you felt that it was incumbent upon you to investigate the source – the information shared with you?
>
> A. Yes. (Emphasis added) (App. 22-23).

Consequently, Franklin, whom the trial court had already found to be capable of making the determination as to his source's reliability, testified unequivocally that the individual who provided information in this case was not reliable enough to act upon, without corroboration.

The trial court ignored Franklin's analysis, denied Petitioner's Motion to Suppress and concluded that Franklin's "confidential source" was a "reliable informant" and, therefore, that Franklin was authorized to act on the information which the source supplied alone. App. 6. The Court of Appeals affirmed the trial court's decision, citing no "clear error" by the trial court. (App. 6). These conclusions are erroneous based on the evidence adduced at the suppression hearing and violate Defendant's rights under the Fourth Amendment to the United States Constitution. *See Florida v. J.L.*, 529 U.S. 266, 120 S. Ct. 1375, 146 L.Ed.2d 254 (2000). *See also White*, 110 L.Ed.2d at 308; *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L.Ed.2d 527, 548 (Rehnquist, J.) (1983). *See also*

United States v. Jones, 242 F.3d 215, 218-19 (4th Cir. March 1, 2001).

This Court has previously considered how police should proceed when a person providing them with information for a warrantless search is an anonymous tipster, as well as how police should proceed when that person is a known, reliable confidential informant. *See J.L.*, 146 L.Ed.2d at 261. *See also Adams v. Williams*, 407 U.S. 143, 92 S. Ct. 1921, 32 L.Ed.2d 612, 617 (Rehnquist, J.) (1972). However, this case introduces a third category of source, heretofore not considered by this Court, where police knew the identity of the individual providing information, although his reliability was, at best, unknown or undetermined.[1]

In *J.L.*, Justice Kennedy opined that, "[i]f an informant places his anonymity at risk, a court can consider this factor in weighing the reliability of the tip." *J.L.* at 263 (Kennedy, J. concurring). *See also United States v. Thompson*, 234 F.3d 725, 729 (D.C. Cir. 2000) (holding that a witness who tells police in person that he has just observed criminal activity is inherently more reliable than an anonymous tipster); *United States v. Valentine*, 232 F.3d 350, 355 (3d Cir. 2000). Since *J.L.*, though, federal courts have considered situations where the source of the

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[1] Petitioner contends, since Franklin testified that his source was *unreliable*, analyzing the source's tip as if from someone whose reliability had not yet been proven either way would be a charitable gesture on the part of the presiding Court. However, for the sake of brevity, Petitioner will refer to the source in this case as a "known informant of unknown reliability."

tip was known, but the source's reliability was unproven, and, although certain "public" details of the tips could be corroborated, the courts, as this Court did in *White*, required, "something more" before they would determine the existence of reasonable suspicion. (Citation and internal quotations omitted), 110 L.Ed.2d at 308. *See also United States v. Morales*, 252 F.3d 1070, 1074 (9th Cir. June 7, 2001); *United States v. Colon*, 250 F.3d 130, 134 (2d Cir. May 14, 2001); *United States v. Thomas*, 211 F.3d 1186, 1190 (9th Cir. 2000).

The tenor of Justice Kennedy's concurrence, which provides a foundation for *Thompson* and *Valentine*, is that knowledge of the informant's identity creates an accountability which, in and of itself, could spell the difference between her being an anonymous tipster and a reliable, confidential informant. *See J.L.* at 263-64 (holding that the ability to identify and informant and, therefore, have the ability to prosecute her for a bad tip is a factor in the analysis of her reliability). *See also Valentine*, 232 F.3d at 355. However, the mere specter of personal accountability for a bogus tip is not sufficient to overcome the requirements of *Gates* and *White* with regard to the determination of a source's reliability. *See, e.g., United States v. Mick*, 264 F.3d 553, 565 (6th Cir. August 29, 2001) (holding that the mere assertion that an informer is known to police and has provided accurate information in the past is insufficient to survive the *Gates* analysis).

A known informant of unknown reliability is neither the total stranger that the anonymous tipster is, nor the stalwart for information that the reliable, confidential informant is. *Compare J.L.* at 260-61 (holding that a tip from an anonymous source did not give rise to reasonable

suspicion) *with Adams*, 32 L.Ed.2d at 617 (holding that a tip from a known, reliable, confidential informant did give rise to reasonable suspicion). A determination that an individual, whose information led to a warrantless stop, is a known informant of unknown reliability should subject the content of his tip to analysis under *White*. 110 L.Ed.2d at 308. The analysis would account for the fact that the source was not a total stranger as part of an assessment of the totality of the circumstances, as described in *White, supra*, and *Gates*, 76 L.Ed.2d at 548.

In *White, supra*, this Court adopted the "totality of circumstances" analysis of an anonymous tipster's information from *Gates* in the context of a reasonable suspicion determination. *Gates* had, in turn, previously adopted the critical factors of veracity, reliability and basis of knowledge from *Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509, 12 L.Ed.2d 723 (1964) and *Spinelli v. United States*, 393 U.S. 410, 89 S. Ct. 584, 21 L.Ed.2d 637 (1969). *Gates* at 543.

In adopting the *Gates* analysis in *White*, Justice White wrote that, "[r]easonable suspicion, like probable cause, is dependent upon both the content of the information possessed by police and its degree of reliability." 110 L.Ed.2d at 309. Therefore, neither a dearth of information, nor a source's unreliability – due to anonymity or otherwise – will automatically be fatal to a particular stop, but, where one is deficient, the other must compensate. *Id.*

Justice White also stated that, "[w]hat is important is the caller's ability to predict . . . *future behavior*, because it demonstrated inside information – a special familiarity with respondent's affairs." *Id.* at 310. This excludes information that is contemporaneous with a tipster's call to

police. Information which, "[a]nyone could have 'predicted,' " will not suffice, nor will, "a condition presumably existing *at the time of the call.*" *Id.* (emphasis added). Furthermore, even information from known, reliable informants must be confirmed for its basis of knowledge, as well as either its "insider" quality or its ability to predict future behavior before police can claim to have reasonable suspicion to act. *Gates* at 545.[2]

By applying the *White* analysis, the source in this case could not have, based on his tip alone, provided police with a reasonable suspicion of criminal activity. *See White* at 309. In *White*, a "close case," an anonymous tip indicated: from whence the suspect was leaving; the time she was leaving; whither she was going and even what type of contraband she possessed. *Id.* at 307, 310. In the case at bar, the tip indicated the color, make and model of the automobile in which the suspects were riding and their location contemporaneously with the tip's being phoned in. (App. 28). The source also indicated that the suspects were either white or black. What the source did not indicate was how he knew this information, what type of drugs the suspects allegedly had or any information predictive of future events. *See Gates* at 545 (suggesting that, where an informant is known to police, he may be entitled to some deference in terms of the reliability analysis, but that the totality of the circumstances still must be considered).

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[2] The lower courts overlooked this matter, instead ending their analyses with the finding of reliability.

Franklin himself said that he could not act on this particular source's information, standing by itself and that it would require, "independent investigation to attempt to verify the information," before acting upon it. (App. 22). The details of Franklin's source's tip, giving descriptive features of the automobile and its location *at the moment* the information was given, were readily observable to any member of "the general public" and, therefore, did not demonstrate any "special familiarity with respondent's affairs." *White* at 310. *See also J.L., supra.* The content of the information, then, cannot overcome the unreliable nature of Franklin's source under the *Gates* framework. *Id.*

Furthermore, and contrary to the assertions in *Thompson,* reliability cannot derive solely from familiarity. *Compare Gates, supra, with Thompson,* 234 F.3d at 729. As in this case, a source may be familiar to police, but nonetheless unreliable. *See also Mick,* 264 F.3d at 565. A more common scenario involving the known informant of unknown reliability is the one anticipated by Justice Kennedy in *J.L.,* which occurred in *Thompson,* where a heretofore unknown individual approached police and informed them of ongoing criminal activity. 234 F.3d at 729. In either situation, police knowledge of the source's identity may slightly mitigate her lack of reliability, but the content of the tip still must contain indicia of reliability of a quality demanded by *White* before the tip will give rise to reasonable suspicion. 110 L.Ed.2d at 308.

Even though *Gates* abandoned what is described as a "rigorous" test of source reliability under *Spinelli,* this Court observed that, "a conscientious assessment of the basis for crediting such tips is required by the Fourth

Amendment." *Gates* at 548. Thus, an officer may take into account that his source is not a total stranger when making the *Gates* assessment, but he must, by the same token, consider what indicia of reliability exist in the tip to counterbalance the fact that he is not as familiar as the known, reliable informant. *White* at 310; *Gates* at 550. As in the instant matter, where reliability is neither inherent, as with the reliable informant, nor non-existent, as with the anonymous tipster, *White* dictates that the tip will only create reasonable suspicion if it is supported by, "something more." (Citation and internal quotation omitted) 110 L.Ed.2d at 308.

In this case, "something more" would be verifiable information within the tip demonstrating more than just the type of information available to any member of the public. *Id.* The Court of Appeals, having rejected the trial court's conclusion that Petitioner's driving method justified the stop, deferred to the trial court's conclusion that the source, standing alone, provided "a founded suspicion that Wilson's vehicle was carrying drugs." (App. 6). However, in failing to assess the totality of the circumstances, the trial court and the Court of Appeals were in error.

First, both courts appeared to have disregarded Franklin's mistrust of his source in making their legal conclusions. *See Ornelas v. United States*, 517 U.S. 690, 116 S. Ct. 1657, 1659, 134 L.Ed.2d 911 (1996) (holding that a reviewing court must give "due weight" to a police officer's analysis of the facts giving rise to the reasonable suspicion determination and the inferences he draws therefrom). The lower courts in this matter all branded the source a reliable informant, the reliability of whose

information was above reproach. This was contrary to the facts in the record, which indicated that this informant was known to Franklin, but was not considered reliable. *Ornelas*, 116 S. Ct. at 1659.

Futhermore, Justice Ginsburg states in *J.L.* that, "[t]he reasonableness of official suspicion must be measured by what the officers knew *before they conducted their search.*" (Emphasis added) 146 L.Ed.2d at 260. This position is consistent with that taken by the Court in *Maryland v. Garrison*, 480 U.S. 79, 107 S. Ct. 1013, 94 L.Ed.2d 72, 81 (1987), where Justice Stevens wrote that, "we must judge the constitutionality of [police] conduct in light of the information available to them at the time they acted."

The Court's position that reasonable suspicion is based on what the police officer knew when he took action, rather than the trial court's assessment of what the officer knew, *ex post facto*, completely corrupts the trial court's determination of the source's reliability in this case. *J.L., supra*. Regardless of how the trial court construed the facts, it is undisputed that Franklin himself did not consider his source "reliable" at the time he acted on that source's information.[3] (App. 22). Therefore, absent an argument invoking the trial court's *a priori* awareness of the officer's relationship with the source, Franklin, having excluded his source from the reliable category, was acting on a tip that he considered sufficient to overcome the fact that it came from an unreliable source.

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[3] In light of the fact that O.C.G.A. § 17-5-30 places the burden of persuasion upon the State in a motion to suppress, it is highly questionable whether the facts in evidence overcome that burden at all.

Therefore, at the time of Franklin's stop of Petitioner, he was relying exclusively upon the "accurate description of [Petitioner's] readily observable location and appearance," not any predictive or "insider" information, sufficient to justify his stop of Petitioner. *White, supra. See also J.L.* at 260 (holding that readily observable facts and a description of the suspect's present location will not give rise to reasonable suspicion). Based on *J.L.*, as well as an assessment of the totality of the circumstances under *White, supra,* and *Gates, supra,* Franklin lacked reasonable suspicion to order the stop of the automobile. *J.L.* at 260.

Each lower court also erred by apparently superseding the line of cases which includes *Aguilar v. Texas,* 378 U.S. 108, 84 S. Ct. 1509, 12 L.Ed.2d 723 (1964), *Gates, supra,* and *White, supra.* For, if the courts had followed the mandates of those cases, they would have conducted a totality of the circumstances analysis, which would have taken into account not only Franklin's mistrust of the source, but also Franklin's failure to ascertain the source's basis of knowledge and the lack of indicia of reliability contained in the source's tip. *Gates, supra.*

Aguilar proscribes that a court test the basis of knowledge of *any* informant who provides police with information, upon which they ultimately act. 12 L.Ed.2d at 723. Although *Gates* eventually replaced *Aguilar* as the litmus test for informant reliability, *Gates* declared that the basis of knowledge test in *Aguilar* remains, "highly relevant." 462 U.S. at 213. Given Franklin's misgivings about this source's reliability and the continued relevance of *Aguilar* in the *Gates* analysis, the Court should have considered the basis of the source's knowledge in this case.

The record reflects that Franklin failed to ask the basis of the informant's knowledge as to the tip he was providing. (App. 30-31). Without privity as to the basis of the source's knowledge, it was error for the trial court to deny Petitioner's motion to suppress. *Gates, supra.* Furthermore, regardless of the informant's reliability, the nature of the information contained in the tip must be more than benign observations occurring contemporaneously with the communication.[4] *See J.L., supra. See also Gates, supra; White, supra; Aguilar, supra.* As the Court observed in *J.L.*, "[a]n accurate description of the subject's readily observable location and appearance is of course reliable in this limited sense: It will help the police correctly identify the person whom the tipster means to accuse. Such a tip, however, does not show that the tipster has knowledge of concealed criminal activity." 146 L.Ed.2d at 261.

The Court of Appeals limited the relevance of *Gates, White* and other cases addressing indicia of a source's reliability to those involving "anonymous telephone tip[s]." (App. 6). *But see Gates, supra* (holding that any informant's reliability is analyzed in light of the totality

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[4] Although not precedent in this Court, Defendant notes that *VonLinsowe v. State*, 445 S.E.2d 371, 372, 213 Ga.App. 619 (Ga.App. 1994), involves an anonymous tip containing substantially the same information as the tip in this case, such as a description of the defendant's vehicle, its license number and an indication of where she was headed at the time of the tip. The Georgia Court of Appeals said that that tip did not give rise to reasonable suspicion under *White*, because it only described "information available to any member of the motoring public." *Id.* Thus, in the State of Georgia, the information in the tip did not give rise to reasonable suspicion. *Id.*

of the circumstances). However, as addressed, *supra*, these cases are also relevant when the tip comes from a reliable informant or a known informant of unknown reliability whose information police must test for indicia of reliability. Therefore, *Gates* and *White* are, contrary to the Court of Appeals's opinion, highly relevant in this case.

The source's information in this case fails to meet the standards of *White*. Franklin testified that his source told him that Petitioner's car was supposed to be driving in the area of Redan Road and Covington Highway at the time the tip was being given. (App. 28). The source also indicated that the suspects were two males, black or white, probably black, traveling in a white Jeep Cherokee, early to mid-90's model, license tag number was 324 JLC, and that there were drugs in the vehicle. (App. 28).

This tip did not demonstrate any kind of, "special familiarity with respondent's affairs." *White, supra*. Instead, it recites information that, by and large, could have been obtained by any member of public casually observing the car. *See J.L., supra*. The lower courts in this case have disregarded well-established precedents which dictate that, where an officer knows that a source *is not reliable*, a court must conduct a "totality of the circumstances" analysis of the tip to determine whether or not police action was justified, even if the source is not a complete stranger to that officer. *See Gates* at 527.

This Court should reverse the trial court's order denying Petitioner's Motion to Suppress.

II. Certiorari is warranted because the Georgia Court of Appeals applied an improper, deferential standard to its review of the trial court's motion to suppress where it should have reviewed the trial court's determination *de novo*, in direct contradiction of United States Supreme Court precedent.

This Court has, as recently as 1996, held that "the ultimate questions of reasonable suspicion and probable cause to make a warrantless search should be reveiwed *de novo*." *Ornelas v. United States*, 517 U.S. 690, 116 S. Ct. 1657, 1659, 134 L.Ed.2d 911 (1996). In *Ornelas*, the district court held that reasonable suspicion to stop a car which fit certain characteristics of "a drug-courier profile." 116 S. Ct. at 1660. The district court further found that, upon stopping the car, "reasonable suspicion became probable cause" to conduct a warrantless search after discovering a "loose" panel in the car's door, which was consistent with drug smuggling activity. *Ornelas* at 1660. The district court had made this finding in contradiction to the finding of the magistrate's recommendation that, although reasonable suspicion did exist, the "loose" panel did not give rise to probable cause to believe the car was being used for drug smuggling. *Id.* In its second review of the case,[5] the Seventh Circuit applied a deferential standard of review and, since they found no clear error in either the probable cause or reasonable suspicion determinations, affirmed the rulings. *Id.* at 1661.

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[5] Initially, the Seventh Circuit remanded the case for a determination as to the officer's credibility regarding the loose panel determination. *Ornelas* at 661. The magistrate found the officer's testimony credible and the appeal that eventually ended up before this Court ensued. *Id.*

The defendant appealed to this Court, citing a split in the Circuits as to the appropriate standard of appellate review of the reasonable suspicion/probable cause determination. *Id.* (Citation omitted). Chief Justice Rehnquist summarized the analysis as follows:

> [t]he principal components of a determination of reasonable suspicion or probable cause will be the events which occurred leading up to the stop or search, and then the decision whether these historical facts, viewed from the standpoint of an objectively reasonable police officer amount to reasonable suspicion or to probable cause. The first part of the analysis involves only a determination of historical facts, but the second is a mixed question of law and fact. *Id.* at 1661-1662.

The opinion goes on to state, "[w]e therefore hold that as a general matter determinations of reasonable suspicion and probable cause should be reviewed *de novo* on appeal." *Id.* at 1663. Significantly, Chief Justice Rehnquist's closing remarks emphasize that appellate courts must "review findings of historical fact only for clear error and . . . give due weight to inferences drawn from those facts by resident judges and local law enforcement officers." *Id.* In the discussion that follows, the Chief Justice supports the proposition by explaining that:

> [a] trial judge views the facts of a particular case in light of the distinctive features and events of the community; likewise a police officer views the facts through the lens of his police experience and expertise. The background facts provide a context for the historical facts, and when seen together yield inferences that deserve deference. *Id.*

Thus, according to *Ornelas*, "[a]n appeals court should give due weight to a trial court's finding that the officer was credible and the inference was reasonable." *Id.*

The present case presents the question of how an appellate court should proceed when the trial court determines that an officer's testimony is credible, but nonetheless disregards the factual conclusions that the officer actually reaches. The issue is particularly difficult in this case because the officer, whose credibility and competence were established by the court, and the trial court have drawn diametrically opposite inferences as to the central issue of the source's reliability from the same facts.

Having considered this fact, the trial court proceeded to engage in what was a remarkable exercise in legal gymnastics. In an effort to reconcile its previous conclusion that Franklin was competent to make a conclusion as to the source's reliability, and its holding that the source was reliable despite Franklin's explicit testimony to the contrary, the court wrote, "[h]owever else the investigating detective may characterize the source of information, the court finds the source is reliable for the purpose of deciding the motion to suppress." Id.[6] This alleged

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[6] Franklin's definitions of a "confidential informant," as "a source of information that has been established over a period of time and is deemed . . . to be reliable without any need to . . . verify the information that has been given to me," as opposed to a "confidential source," whose information requires, "independent investigation," leaves no ambiguity as to how this source's information should have factored into the *Terry*

reliability, coupled with Defendant's, "suspicious method of driving the car," gave rise to a reasonable suspicion of criminal activity sufficient to authorize the stop, according to the trial court. Id.

The Georgia Court of Appeals deferred to the trial court's conclusion that Franklin's source was a "reliable informant," citing a lack of clear error in that conclusion. (App. 6). Having discredited the trial court's holding regarding Defendant's driving, the Georgia Court of Appeals nonetheless concluded that the trial court's holding regarding reasonable suspicion was entitled to its deference and that the denial of the motion to suppress would therefore stand, because, considering the trial court's finding, the tip gave police sufficient grounds to act. (App. 6). In its opinion, the Court stated that, "[c]onstruing the evidence most favorably to uphold the trial court's findings, as we must, we cannot say that its determination that the informant was reliable was clearly erroneous." (App. 5).

The trial court's decision to disregard Franklin's analysis of the source's reliability and the Georgia appellate courts' subsequent ratification of that action betrays this Court's holding in *Ornelas, supra*. In particular, when the trial court ignored Franklin's determination that his "source" was decidedly *not* a "reliable, confidential informant," it eschewed Franklin's own view of "the facts through the lense of his police experience and expertise,"

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analysis of the stop of the automobile. (App. 22). Franklin has provided a practical example of a reasonable officer's implementation of the *White* analysis, to which the trial court should have deferred. *Ornelas, supra*.

in favor of its own result-driven analysis. *Ornelas* at 1663. *See also Kitchens v. Smith*, 401 U.S. 847, 91 S. Ct. 1089, 28 L.Ed.2d 519, 521 (1971) (holding that, where the Georgia courts had made a finding which, "is explicable only under the most rigid rules of testimonial construction," they had failed to derive "the undeniable implication of his testimony," and therefore were overruled).

The trial court's finding that the source was reliable stands in ironic contrast to its succinctly reasoned response to Defendant's objection that Franklin was competent to testify as to the reliability of the source's information. (App. 13-14). By deferring to the trial court's holding on the stated grounds, the Georgia Court of Appeals validates the trial court's contradiction and ignores *Ornelas*'s holding that, "[t]he background facts [known to the officer] provide a context for the historical facts, and when seen together yield inferences that deserve deference." 116 S. Ct. at 1663.

Under those circumstances, this Court should not shield the reliability determination from comprehensive review. To designate this crucial determination a finding of fact will render the Fourth Amendment protection of reasonable suspicion considerably more vulnerable to misinterpretation and abuse by those who would infer automatic reliability from anyone who is known to, or has previously given information to police, regardless of their actual reliability. *See White*, 110 L.Ed.2d at 309 (holding that, under *Gates*, information from a source of unknown reliability must be verified by indicia of reliability).

In fact, *Ornelas*'s mandate that reasonable suspicion is itself a legal conclusion and, therefore, subject to *de novo* review strongly suggests that determination of a source's reliability, which effectively replaces the reasonable suspicion analysis in cases involving use of sources, tipsters, informants, etc., should itself be regarded as a conclusion of law, subject to plenary review. 116 S. Ct. at 1663.

The message of *Ornelas* is that appellate courts should not be hamstrung by a deferential standard of review from conducting a thorough analysis of the trial court's determination of the reasonable suspicion, upon which police acted. *Id.* at 1662. It further suggests that all courts must consider the record before it, "from the standpoint of an objectively reasonable police officer." *Id.* at 1662-63.

Therefore, at a minimum, this case should be remanded to the Georgia Court of Appeals for a *de novo* review of the trial court's decision on the motion to suppress.[7]

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[7] Defendant does not, however, concede that *de novo* review is the only standard which would require reversal of the trial court's order. Given Franklin's unequivocal testimony, supplemented by his textbook definitions of a reliable, versus unreliable, informant, it would be appropriate to hold that the court's determination that the informant was reliable was an abuse of discretion. *See Ornelas*, 116 S. Ct. at 1661, n.3.

CONCLUSION

The entire case at bar rests upon the word of an individual known only to Detective Franklin. Franklin's testimony assessed the status of his informant as a confidential source. Franklin declared that he did not believe his source to be reliable, nor did he believe that he could act upon the source's information without further investigation, despite the fact that the source had provided information in the past. Franklin's careful distinction between a reliable "informant" and a confidential "source," was the only information available to him at the time, and therefore should have provided the sole basis for the trial court in drawing its conclusions as to the level of the source's reliability.

Therefore, it should have been impossible for the trial court to have determined that this source was either a total stranger to Franklin, or a reliable confidential informant for the detective. An obvious and rational compromise between these two extremes should have been that this source was a known informant of unknown reliability.

Having determined that the source's profile best fit this intermediate characterization, the trial court should then have assessed the information in light of the "totality of the circumstances." Understanding that the source's information was devoid of both predictive information and information of an "insider" quality, the trial court should then have concluded that the stop of Petitioner was unlawful in light of the "totality of the circumstances."

Subsequently, regardless of the conclusion it ultimately reached, the Georgia Court of Appeals should have reviewed the trial court's conclusions as to the source's level of reliability and the overall reasonableness of the stop *de novo* and without deference to the trial court's erroneous conclusion that this source was a known, reliable informant.

Therefore, this Court should grant Certiorari to correct the harmful and prejudicial constitutional errors of the courts below.

Respectfully submitted,

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FOURTH DIVISION
SMITH, P. J.,
BARNES AND PHIPPS, JJ.

NOTICE: Motions for reconsideration must be *physically received* in our clerk's office within ten days of the date of decision to be deemed timely filed. (Court of Appeals Rules 4 and 37, December 14, 2000) http://www.appeals.courts.state.ga.us/rules.html

May 9, 2001

In the Court of Appeals of Georgia

A01A0037. WILSON v. THE STATE.

PHIPPS, Judge.

Convicted at a stipulated bench trial of possession of cocaine with intent to distribute and possession of more than one ounce of marijuana, Damon Wilson appeals the denial of his motion to suppress evidence of the drugs seized during a warrantless search of his car. He claims that the initial investigatory stop was illegal because it was based solely on a tip from an unreliable informant. We accept the trial court's finding that the informant was reliable and find that the investigatory stop was legal. We therefore affirm.

The following evidence was introduced at the motion to suppress hearing. On April 26, 1999, DeKalb County Police Detective Franklin received a tip from a confidential informant that a white Jeep Cherokee, license tag number 324 JLC, could be found immediately in the area of Redan Road and Covington Highway and that the Jeep would be carrying a large quantity of illegal drugs. The

informant told Franklin that the Jeep would be occupied by two black males. When he received the tip, Franklin notified uniformed officers Becker and Frank that he would be moving into the area.

Approximately five minutes after receiving the tip, Franklin arrived at the area in his unmarked vehicle. Shortly thereafter, he saw a white Jeep Cherokee turning onto Redan Road from Holcombe Road, coming from the direction of Covington Highway. From behind the Jeep, he saw that the license tag number matched the one given by the informant, that the driver was a black male and that the passenger, who was reclined in the seat, also appeared to be male. Franklin testified that the driver repeatedly looked into his side view and rear view mirrors and turned around in his seat to watch the vehicles following him. Having confirmed most of the information given by the informant, Franklin instructed Officer Becker to perform an investigative stop of the vehicle.

Becker located the Jeep Cherokee, drove behind it and activated his blue lights. When the Jeep stopped, Becker, speaking through his public address system, asked the driver, whom he later identified as Wilson, to get out and go to the rear of the vehicle. Wilson complied with that request as well as Becker's request for his driver's license. Becker asked Wilson if there were any guns in the vehicle and Wilson said "yes." Wilson told Becker that the gun was located under the driver's seat. After patting Wilson down, Becker went to the driver's side of the vehicle, looked under the driver's seat and saw a gun and a bag of marijuana. When Wilson acknowledged that the gun and marijuana belonged to him, Becker placed him under arrest.

Becker then asked Officer Frank to conduct an open air search of the vehicle. After Wilson's passenger exited, Frank walked his dog (trained in the detection of narcotics) around the outside of the vehicle. The dog "alerted" on the front driver's side and the front passenger's side of the vehicle and again in the back seat when he entered the vehicle. The officers found two bags of cocaine on the front passenger floor board and a large amount of marijuana under the back seat.

The trial court found the source of the confidential information reliable and denied Wilson's motion to suppress, holding that "[t]he reliable confidential information received by the police coupled with Wilson's suspicious method of driving" were sufficient to authorize the investigative stop. The trial court also found that when Wilson admitted he had a weapon in the car, near where the passenger was seated, Becker had the right to retrieve the weapon for his own safety. While retrieving the gun from under the seat where Wilson told him it was located, Becker saw the marijuana under the seat, thereby justifying Wilson's arrest and the subsequent open air search of the vehicle.

When reviewing a trial court's ruling on a motion to suppress, we defer to the trial court's findings of fact unless they are clearly erroneous and construe the evidence in favor of the trial court's decision.[1]

Wilson challenges the legality of the investigatory stop of his vehicle.

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[1] *State v. Becker*, 240 Ga. App. 267 (523 SE2d 98) (1999).

> 'Momentary detention and questioning are permissible if based upon specific and articulable facts, which, taken together with rational inferences from those facts, justify a reasonable scope of inquiry not based on mere inclination, caprice or harassment. An authorized officer may stop an automobile and conduct a limited investigative inquiry of its occupants, without probable cause, if he has reasonable grounds for such action – a founded suspicion is all that is necessary, some basis from which the court can determine that the detention was not arbitrary or harassing. (Cit.)) [Cit.][2]

Wilson claims that the trial court improperly found that the informant was reliable. He also contends that the informant's tip was insufficient to authorize the stop of his vehicle.

During the suppression hearing, Franklin testified on direct examination that the informant had given him information about possible illegal activity on two prior occasions and that both cases had resulted in arrests and the seizure of vehicles, cocaine and a large amount of U.S. currency. On cross-examination, however, he distinguished what he referred to as a "confidential source" from a "confidential informant." He testified that he felt it necessary to investigate and attempt to verify information received from a confidential source. He defined a confidential informant as a source of information whose reliability had been established over a period of time. He deemed information from a confidential informant to be

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[2] *State v. McFarland*, 201 Ga. App. 495, 496 (411 SE2d 314) (1991).

reliable without direct investigation. Franklin testified that the information in this case came from a confidential source.

Construing the evidence most favorably to uphold the trial court's findings, as we must, we cannot say that its determination that the informant was reliable was clearly erroneous.[3]

Wilson argues that, regardless of the informant's reliability, the information given must provide some basis for predicting the future behavior of the suspect. This rule applies to an anonymous telephone tip,[4] but not to a tip from a known, reliable informant.[5]

> The purpose of requiring that an anonymous tip give predictive information is to allow the police a means to test reliability before acting on the broader prediction that the suspect is engaged in criminal activity. Imposing such a requirement is unnecessary where . . . the informant's reliability is otherwise established.[6]

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[3] See *Johnson v. State*, 230 Ga. App. 535 (1) (496 SE2d 785) (1998) (informant found reliable because he had provided information that led to three prior arrests and/or seizures of drugs); *Rider v. State*, 222 Ga. App. 602 (475 SE2d 655) (1996) (confidential informant who had given information four previous times leading to two search warrants and five arrests was reliable); *Anthony v. State*, 197 Ga. App. 297, 298 (1) (398 SE2d 580) (1990) (informant deemed reliable because his information had resulted in three or four prior arrests).

[4] *VonLinsowe v. State*, 213 Ga. App. 619 (1) (445 SE2d 371) (1994).

[5] *Rider*, 222 Ga. App. at 604.

[6] Id. (Citation omitted).

Wilson claims that the trial court improperly coupled his "suspicious method of driving" with the informant's tip in finding a legal basis for the investigatory stop. We agree that Wilson's method of driving did not support the trial court's decision to deny his motion to suppress, but nevertheless we find that the officers had a legal basis for the stop. Based on the detailed information given by the reliable informant and Franklin's subsequent verification of most of that information, the officers had a founded suspicion that Wilson's vehicle was carrying drugs. Thus, the brief, investigatory stop was justified.[7]

Judgment affirmed. Smith, P.J., and Barnes, J., concur.

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[7] See *Samuel v. State*, 198 Ga. App. 558, 559-560 (1) (402 SE2d 325) (1991); *West v. State*, 194 Ga. App. 620, 621 (391 SE2d 673) (1990).

IN THE SUPERIOR COURT OF DEKALB COUNTY
STATE OF GEORGIA

STATE OF GEORGIA,	*	INDICTMENT
v.	*	NO. 99CR3755
DAMON L. WILSON,	*	ORDER ON MOTIONS
OWEN VOGELSON,	*	TO SUPPRESS
Defendants.	*	(Filed Oct. 22, 1999)

This case alleging violations of the controlled substances act is before the court on defendants' motions to suppress evidence of contraband seized from defendant Wilson's car. The court has conducted an evidentiary hearing and received legal argument. After considering the matter, the court denies the motions of each defendant, but for different reasons.

The defendant Owen Vogelson claims no possessory interest in any of the contraband seized by the police officers. Because he was a passenger in the car, had no ownership interest in the car and claims no interest in the property taken, he lacks standing to challenge the seizure.

The defendant Damon Wilson, owner and driver of the car, claims the seizure followed a unlawful stop of his car. If the stop was illegal, he argues any evidence seized must be suppressed.

The court finds the police had sufficient information to make an investigatory stop of the car. The source of the information had provided reliable information on two prior cases which led to the discovery of contraband and

successful prosecutions and forfeitures. However else the investigating detective may characterize the source of the information, the court finds the source is reliable for the purpose of deciding this motion to suppress. The reliable confidential information received by the police coupled with Mr. Wilson's suspicious method of driving the car was sufficient to authorize an investigatory stop. *Johnson v. State*, 230 Ga.App. 535, 496 S.E.2d 785 (1998).

Once Mr. Wilson admitted he had a weapon in the car, close to the area where the co-defendant passenger was sitting, the arresting officer had a right to retrieve the weapon for his safety. Upon retrieving the concealed weapon, he observed adjacent to it a quantity of material which resembled marijuana and which later proved to be so.

Those facts were sufficient to authorize the arrest of Mr. Wilson and a subsequent free-air search of the car by the canine. Under all the circumstances of the case, the police seizure of the contraband did not violate the defendants' rights under either the federal or state constitution.

Accordingly, the motions to suppress are denied.

SO ORDERED, this 22 day of October, 1999.

/s/ Robert J. Castellani
ROBERT J. CASTELLANI, JUDGE
STONE MOUNTAIN
JUDICIAL CIRCUIT

cc: L. David Wolfe
Henry C. Johnson, Jr.
Jennifer Daniels

SUPREME COURT OF THE STATE OF GEORGIA

CLERK'S OFFICE

ATLANTA

DATE: October 01, 2001

Larry David Wolfe
1800 Peachtree Street, N.W.
Suite 300
Atlanta GA 30309

Case No. S01C1312

DAMON WILSON v. THE STATE

COURT OF APPEALS CASE NO. A01A0037

The Supreme Court today denied the petition for certiorari in this case.

All the Justices concur.

Sherie M. Welch, Clerk

IN THE SUPERIOR COURT FOR THE COUNTY
OF DEKALB, STATE OF GEORGIA
SEPTEMBER TERM, 1999

STATE OF GEORGIA	INDICTMENT NO. 99-CR-3755
V.	
DAMON WILSON AND OWEN VOGELSON	MOTION TO SUPPRESS

TRIED BEFORE THE HONORABLE ROBERT J. CASTELLANI, JUDGE, SUPERIOR COURT, STONE MOUNTAIN JUDICIAL CIRCUIT, ON OCTOBER 20, 1999, WITHOUT THE INTERVENTION OF A JURY.

APPEARANCES

FOR THE STATE:	JENNIFER DANIELS, ASSISTANT DISTRICT ATTORNEY
FOR THE DEFENDANTS:	
(WILSON)	L. DAVID WOLF
(VOGELSON)	HENRY JOHNSON

REPORTED BY:

LAWSON THIGPEN
OFFICIAL COURT REPORTER
DEKALB COUNTY COURTHOUSE
DECATUR, GEORGIA 30030

[2] MS. DANIELS: THE STATE CALLS DETECTIVE R. L. FRANKLIN.

THE COURT: I HAVE READ MR. WOLF'S MOTION AND I WANT TO MAKE SURE WE HAVE IT ON THE RECORD, THIS IS A WARRANTLESS SEARCH.

R. L. FRANKLIN,

A WITNESS CALLED ON BEHALF OF THE STATE, AFTER HAVING FIRST BEEN DULY SWORN, TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION

BY MS. DANIELS:

Q. STATE YOUR NAME FOR THE RECORD, PLEASE.

A. DETECTIVE R. L. FRANKLIN.

Q. HOW ARE YOU EMPLOYED, SIR?

A. EMPLOYED BY THE DEKALB COUNTY POLICE DEPARTMENT, AND ASSIGNED TO THE NARCOTIC UNIT.

Q. HOW LONG HAVE YOU BEEN ASSIGNED TO THE NARCOTICS UNIT?

A. OVER A YEAR-AND-A-HALF NOW.

Q. WHERE WERE YOU ASSIGNED PRIOR TO THAT?

A. TO THE SOUTH PRECINCT, NOW REFERRED TO AS THE COPS UNIT, BUT AT THE TIME THE COBRA UNIT.

Q. WHAT KIND OF UNIT IS THE COBRA UNIT?

A. IT'S A STREET LEVEL DRUG ENFORCEMENT DIVISION OF THE UNIFORM – EACH PRECINCT HAS

ONE. WE TARGET STREET LEVEL DRUG VIOLATIONS, PROSTITUTION, CRIME PREVENTION.

Q. HOW LONG DID YOU WORK FOR THE COBRA UNIT?

A. THREE YEARS.

[3] Q. IN APRIL OF THIS YEAR, SPECIFICALLY AROUND APRIL 26TH, 1999, DID YOU RECEIVE SOME INFORMATION REGARDING A LARGE QUANTITY OF SUSPECTED ILLEGAL NARCOTICS IN DEKALB COUNTY?

A. YES, I DID.

Q. AND HOW DID YOU RECEIVE THE NOTIFICATION OR HOW DID YOU RECEIVE THIS INFORMATION?

A. I RECEIVED IT THROUGH A CONFIDENTIAL SOURCE, VIA A PHONE CALL THAT WAS MADE TO MY CELLULAR PHONE FROM THE SOURCE.

Q. OKAY. AND I TAKE IT YOU KNEW THIS SOURCE?

A. YES.

Q. YOU ARE FAMILIAR WITH HIM? THIS IS NOT THE FIRST TIME HE HAS CALLED YOU?

A. THAT'S CORRECT.

MR. WOLFE: OBJECT TO LEADING WITH REGARD TO CRITICAL ISSUES, JUDGE. I'M NOT GOING TO JUMP UP AND DOWN.

THE COURT: WELL, IF HE JUMPS UP THAT MEANS IT'S CRITICAL. OKAY.

Q. HOW MANY TIMES HAVE YOU DEALT WITH THIS CONFIDENTIAL INFORMANT PRIOR TO THE DATE YOU RECEIVED THE PHONE CALL IN APRIL OF THIS YEAR?

A. I BELIEVE TWO TIMES PRIOR; TWO OR THREE TIMES PRIOR TO THIS INCIDENT.

Q. HAD HE GIVEN YOU INFORMATION BEFORE THIS OCCASION ABOUT SUSPECTED ILLEGAL ACTIVITY?

A. YES.

[4] Q. AND WHAT WERE THE RESULTS ON EACH OF THOSE OCCASIONS – WELL, LET ME BACK UP:

HOW MANY TIMES DID HE GIVE YOU INFORMATION ABOUT POSSIBLE ILLEGAL ACTIVITY IN DEKALB COUNTY?

A. I BELIEVE TWICE.

Q. AND TELL THE COURT, IF YOU WILL, THE RESULTS OF WHAT HAPPENED IN EACH OF THOSE?

A. EACH CASE RESULTED IN ARRESTS, SEIZURE OF VEHICLES, SEIZURE OF COCAINE AND A LARGE AMOUNT OF US CURRENCY.

Q. WAS THE INFORMATION THAT HE GAVE YOU ON EACH OF THOSE OTHER CASES, WAS IT RELIABLE? I MEAN, WAS IT REASONABLY TRUE AS TO WHAT YOU ACTUALLY FOUND?

MR. WOLFE: I WILL OBJECT TO THAT QUESTION. THAT IS ASKING HIM – THAT'S ASKING HIM

TO MAKE A CONCLUSION. I THINK HE IS CAPABLE OF TESTIFYING WHAT INFORMATION WAS SHARED WITH HIM AND WHAT THE RESULT WAS. THE QUESTIONS THAT HAVE BEEN ASKED PRIOR TO THIS TIME DON'T LINK UP THE QUESTION THAT WAS JUST ASKED.

THE COURT: OVERRULE THE OBJECTION. HE'S AN OFFICER AND HAS AT LEAST THREE YEARS OF EXPERIENCE TO MAKE THAT EVALUATION.

Q. WAS THE INFORMATION RELIABLE?

A. YES.

Q. IN THIS PARTICULAR OCCASION DETECTIVE, WHEN HE PLACED THE PHONE CALL TO YOU, WHAT INFORMATION DID HE GIVE YOU?

[5] A. THE SOURCE STATED THAT IT WAS GOING TO BE A WHITE JEEP CHEROKEE, EARLY TO MID '90'S MODEL. HE GAVE ME THE TAG NUMBER, THAT THE TAG WAS, I BELIEVE, 324 JLC. HE STATED HE WAS GOING TO BE IN THE AREA OF REDAN AND COVINGTON HIGHWAY, IN THAT AREA. THAT IT HAD THAT TAG NUMBER AND THERE SHOULD BE A LOT OF DRUGS IN THAT VEHICLE.

Q. DID HE TELL YOU ANYTHING ABOUT THE OCCUPANTS OF THE VEHICLE, HOW MANY, RACE, ANYTHING LIKE THAT?

A. HE JUST SAID IT WOULD BE OCCUPIED BY BLACK MALES. I DON'T RECALL HIM SAYING THE EXACT NUMBER.

Q. OFFICER, I'M GOING TO SHOW YOU WHAT'S BEEN MARKED AS STATE'S EXHIBIT NUMBER 1 AND ASK THAT YOU IDENTIFY THIS DOCUMENT. DO YOU KNOW WHAT THAT DOCUMENT IS?

A. THAT'S THE SUPPLEMENTAL REPORT THAT WAS PREPARED BY ME.

Q. IF YOU WOULD, OFFICER, JUST TAKE A MOMENT TO REVIEW THE SECOND PARAGRAPH ON THAT, IF YOU WOULD.

A. HE STATED IT WOULD BE DRUGS –

THE COURT: JUST –

A. I'M SORRY?

Q. JUST REVIEW IT FOR A MOMENT, IF YOU WOULD.

A. UH-HUH.

Q. OFFICER, DOES THAT HELP REFRESH YOUR RECOLLECTION AS TO WHAT IT WAS THAT YOUR CONFIDENTIAL INFORMANT TOLD YOU WITH REGARD TO THE OCCUPANTS, ET CETERA?

A. YES.

[6] Q. HOW MANY OCCUPANTS WERE SUPPOSED TO BE IN THE VEHICLE?

A. TWO.

Q. AND WHAT WERE THE RACES OF THE OCCUPANTS IN THE VEHICLE?

A. BLACK.

Q. AND SEX?

A. MALE.

Q. DID HE GIVE YOU AN APPROXIMATE TIME FRAME AT WHICH POINT THIS JEEP GRAND CHEROKEE WAS GOING TO BE AT THIS LOCATION?

A. UM –

Q. WAS THIS SUPPOSED IS TO BE A WEEK IN THE FUTURE OR –

A. IT WAS SUPPOSED TO BE IMMEDIATELY WITHIN THE TIME THAT HE WAS TALKING TO ME.

Q. WHAT DID YOU DO AFTER YOU RECEIVED THIS INFORMATION FROM YOUR CONFIDENTIAL INFORMANT?

A. I NOTIFIED DEKALB STRIKE FORCE OFFICERS, UNIFORM OFFICERS, S. M. BECKER AND R. L. FRANK, THAT I WAS – WHAT THE INFORMATION WAS THAT I RECEIVED, ADVISING THAT I WAS GOING TO BE MOVING INTO THAT AREA.

AND I DID MOVE INTO THAT AREA AND ATTEMPTED TO VERIFY THE INFORMATION BY LOOKING FOR THE VEHICLE.

Q. WHAT KIND OF CAR OR VEHICLE DID YOU DRIVE TO THAT AREA? WAS THIS A MARKED OR UNMARKED –

A. IT WAS AN UNMARKED VEHICLE.

Q. HOW LONG FROM THE TIME THAT YOUR RECEIVED THE PHONE CALL [7] FROM THE CONFIDENTIAL INFORMANT WAS IT UNTIL THE TIME

THAT YOU ACTUALLY ARRIVED AT THE AREA THAT HE SUGGESTED THAT THE JEEP GRAND CHEROKEE WOULD BE?

A. SAY FIVE MINUTES.

Q. WHAT DID YOU SEE WHEN YOU FINALLY ARRIVED AT THAT AREA?

A. AFTER I RESPONDED TO THE AREA AND BEGAN CHECKING AROUND, A FEW MINUTES LATER I DID OBSERVE A WHITE JEEP CHEROKEE TURNING ONTO REDAN ROAD FROM HOLCOMBE ROAD, COMING FROM THE DIRECTION OF COVINGTON HIGHWAY.

I GOT BEHIND THE VEHICLE, I OBSERVED IT BEARED GEORGIA TAG 324 JLC.

Q. DID YOU SEE ANY OCCUPANTS IN THE VEHICLE?

A. I SEE A BLACK MALE DRIVER AND I COULD SEE WHAT APPEARED TO BE A MALE PASSENGER. HIS SEAT WAS LEANED OVER ALL THE WAY BACK BUT I COULD SEE WHAT APPEARED TO BE A MALE PASSENGER.

Q. DID YOU OBSERVE ANYTHING WITH REGARD TO THEIR –

MR. WOLFE: I WILL OBJECT TO LEADING QUESTIONS. I THINK HE WOULD NOT – "SUCH AS" IS AN IMPROPER QUESTION.

THE COURT: OVERRULED.

Q. DID YOU SEE THE USE OF SEAT BELTS BY THE OCCUPANTS OF THE VEHICLE?

A. WELL, THE PASSENGER WAS NOT WEARING A SEAT BELT, THE SEAT WAS LEANED ALL THE WAY BACK. I DON'T RECALL THE DRIVER.

Q. WHAT DID YOU DO AFTER YOU SAW AND PULLED IN BEHIND AND CONFIRMED THE TAG NUMBER ON THIS JEEP CHEROKEE?

[8] A. I BEGAN PHYSICAL SURVEILLANCE OF THE VEHICLE WITH MY VEHICLE. AS I FOLLOWED THE VEHICLE I UPDATED OFFICER BECKER AND OFFICER FRANK THAT I DID, IN FACT, OBSERVE THE VEHICLE THAT WAS DESCRIBED TO ME BY THE SOURCE, ADVISED THEM OF THE OCCUPANTS, DIRECTION OF TRAVEL, DESCRIPTION OF THE VEHICLE.

Q. TELL THE COURT WHAT YOU OBSERVED WITH REGARD TO THE BEHAVIOR OF THE DRIVER AS YOU FOLLOWED HIM?

A. THE VEHICLE WAS TRAVELING EASTBOUND ON REDAN. THE DRIVER OF THE VEHICLE CONTINUOUSLY LOOKED INTO THE DRIVER'S SIDE VIEW MIRROR. HE WOULD SIT ALL THE WAY UP IN THE SEAT AND LOOK THROUGH THE REAR VIEW MIRROR. HE WOULD TURN COMPLETELY AROUND WITH HIS HEAD, LOOK OUT OF THE REAR OF HIS VEHICLE, WATCHING THE VEHICLES THAT WERE FOLLOWING HIM. HE WAS DRIVING AT A VERY SLOW RATE OF SPEED, NOTICEABLY SLOW RATE OF

SPEED, SLOWER THAN THE REST OF THE TRAFFIC THAT WAS ON THE ROAD.

AS THE VEHICLE CONTINUED EAST ON REDAN IT TURNED NORTHBOUND ON ALLGOOD ROAD. AS IT WAS TURNING NORTHBOUND, STILL CONTINUED TO LOOK OUT OF THE REAR AND AS HE TURNED NORTHBOUND LOOKED OUT THE DRIVER'S WINDOW BACK FROM THE DIRECTION THAT HE WAS COMING FROM TO SEE IF ANY VEHICLES WERE – WHAT VEHICLES WERE FOLLOWING HIM.

ONCE HE TURNED ON ALLGOOD ROAD AT THAT POINT IT WAS CONSIDERABLY LESS TRAFFIC THAN ON THE MAIN ROAD OF REDAN ROAD. ONCE WE BEGAN TO GO NORTHBOUND ON ALLGOOD IT WAS LESS VEHICLES BEHIND US AND HE BEGAN INCREASING HIS SPEED, AS HE WAS TRAVELING [9] NORTHBOUND ON ALLGOOD ROAD.

AS ALL THIS WAS OCCURRING I WAS CONTINUING TO UPDATED OFFICER BECKER AND OFFICER FRANK ON HIS ACTIVITIES AND HIS DIRECTION OF TRAVEL, UP UNTIL THE POINT OF WHERE OFFICER BECKER OBSERVED THE VEHICLE.

Q. DID HE EVER EXCEED THE POSTED SPEED LIMIT WHEN HE WAS TRAVELING ON ALLGOOD?

A. I'M NOT SURE.

Q. DO YOU RECALL – AT SOME POINT YOU NOTIFIED BECKER AND FRANK, IS THAT CORRECT?

A. THAT'S CORRECT.

Q. AND WHAT DID YOU ASK THEM TO DO?

A. I INFORMED THEM WHERE THE VEHICLE WAS GOING, INFORMED THEM OF THE ACTIVITIES, AND BASED ON INFORMATION THAT I RECEIVED I INSTRUCTED OFFICER BECKER TO PERFORM AN INVESTIGATIVE STOP OF THE VEHICLE.

Q. WERE YOU PRESENT WHEN THE INVESTIGATIVE STOP WAS CONDUCTED?

A. NO.

Q. OFFICER, I WANT TO DIRECT YOUR ATTENTION AGAIN TO WHAT WILL BE STATE'S EXHIBIT NUMBER 1. IF YOU WILL, JUST REVIEW BRIEFLY FOR ME THE VERY FIRST PARAGRAPH ON THE PAGE, UP AT THE VERY TOP OF THE PAGE.

I ASKED YOU A MOMENT AGO ABOUT THE SPEED OF THE VEHICLE. DOES THAT HELP REFRESH YOUR RECOLLECTION WITH REGARD TO THE [10] ACTIVITIES OF THE CAR ON ALLGOOD ROAD?

A. THE UNMARKED VEHICLE THAT I WAS IN, SO FAR AS I KNOW, IS NOT CALIBRATED, BUT WHILE FOLLOWING THE VEHICLE AS IT WAS TRAVELING NORTHBOUND ON ALLGOOD ROAD, MY VEHICLE'S SPEEDOMETER WAS GREATER THAN THE POSTED SPEED LIMIT.

Q. AND YOU WERE KEEPING PACE WITH –

A. I WAS KEEPING PACE WITH HIM AND NEVER GAINED GROUND ON HIM.

Q. I THINK I ASKED JUST A MOMENT AGO, AND I APOLOGIZE: WERE YOU PRESENT AT THE TIME THAT BECKER AND FRANK MADE THE STOP

ON THE VEHICLE AND DURING THE ENSUING ACTIVITIES THAT OCCURRED?

A. NO, I WASN'T.

MS. DANIELS: THANK YOU VERY MUCH. I HAVE NO FURTHER QUESTIONS.

CROSS EXAMINATION

BY MR. WOLFE:

Q. LET ME SHOW YOU MY COPY OF WHAT I UNDERSTAND TO BE STATE'S EXHIBIT NUMBER 1 AND I WILL ASK YOU TO LOOK AT THE FRONT PAGE, PLEASE. OKAY?

DO YOU SEE THE STAMP IN THE MIDDLE OF THE PAGE THAT SAYS, "RECEIVED BY INVESTIGATIONS, JUNE 30, 1999"?

A. YES.

Q. DOES THAT HAVE – WHAT DOES THAT MEAN TO YOU?

A. I'M NOT FAMILIAR WITH THAT STAMP.

Q. NOW, A SUPPLEMENTAL REPORT IS A REPORT THAT IS PREPARED [11] AFTER THE INITIAL INCIDENT REPORT IS PREPARED, IS THAT CORRECT?

A. THAT'S CORRECT.

Q. AND CAN YOU TELL ME WHEN THIS SUPPLEMENTAL REPORT WAS PREPARED?

A. I CAN'T RECALL EXACTLY WHEN IT WAS CONCLUDED. MAYBE A WEEK LATER.

Q. NOW, YOU INDICATED IN YOUR DIRECT TESTIMONY THAT YOU RECEIVED INFORMATION FROM A CONFIDENTIAL INFORMANT, CORRECT?

A. FROM A CONFIDENTIAL SOURCE.

Q. WHAT'S THE DIFFERENCE BETWEEN – TO YOU BETWEEN A SOURCE AND AN INFORMANT?

A. A CONFIDENTIAL INFORMANT IS A PERSON – OR A SOURCE OF INFORMATION THAT HAS BEEN ESTABLISHED OVER A PERIOD OF TIME AND IS DEEMED BY ME TO BE RELIABLE WITHOUT ANY NEED TO, WITH DIRECT INVESTIGATION, TO VERIFY THE INFORMATION THAT HAS BEEN GIVEN TO ME.

I LABEL THE CONFIDENTIAL SOURCE, WITHOUT THE TERM OF RELIABLE, BECAUSE IF I RECEIVE INFORMATION FROM THE CONFIDENTIAL SOURCE I TAKE INITIATIVE BY INDEPENDENT INVESTIGATION TO ATTEMPT TO VERIFY THE INFORMATION GIVEN TO ME.

Q. AND THIS GENTLEMEN IN THIS CASE WAS A CONFIDENTIAL SOURCE?

A. THAT'S CORRECT.

Q. SO, WHEN YOU RECEIVED THE INFORMATION FROM HIM YOU FELT THAT IT WAS INCUMBENT UPON YOU TO INVESTIGATE THE SOURCE – THE [12] INFORMATION SHARED WITH YOU?

A. YES.

Q. NOW, WHEN THE SOURCE SHARED THE INFORMATION THAT HE GAVE YOU IN THE TIP,

WOULD IT BE FAIR TO SAY THAT THE INFORMATION HE GAVE, OTHER THAN THE DESCRIPTION OF THE CAR AND THE TAG NUMBER, WAS GENERAL INFORMATION?

A. REPEAT THAT AGAIN.

Q. WOULD IT BE FAIR TO SAY THAT OTHER THAN THE COLOR OF THE CAR AND THE TAG NUMBER THAT THE INFORMATION HE GAVE YOU WAS GENERAL INFORMATION?

A. WITH THE EXCEPTION OF THE RACE AND IN GENERAL THE OCCUPANTS.

Q. OKAY.

A. I WOULD - YOU KNOW -

Q. AND WHEN YOU WENT TO THE LOCATION TO LOOK FOR THE WHITE JEEP CHEROKEE THAT HAD BEEN DESCRIBED TO YOU DID YOU HAVE A SPECIFIC POINT THAT YOU WERE GOING TO BECAUSE THE INFORMANT TOLD YOU THAT VEHICLE WOULD BE THERE?

A. HE SAID REDAN AND COVINGTON HIGHWAY. I RESPONDED TO REDAN AND COVINGTON HIGHWAY.

Q. RIGHT. AND, IN FACT, WHEN YOU GOT THERE YOU DIDN'T SIT IN ONE PLACE, YOU DROVE AROUND LOOKING FOR THE VEHICLE, DIDN'T YOU?

A. THAT'S CORRECT.

Q. AND WHEN YOU FINALLY OBSERVED THE VEHICLE YOU FELL IN [13] BEHIND IT, CORRECT?

A. THAT'S CORRECT.

Q. AND MY UNDERSTANDING IS THAT YOU WERE NEVER DIRECTLY BEHIND THE VEHICLE UNTIL IT MADE THE TURN ONTO ALLGOOD, YOU WERE A COUPLE OF CARS BEHIND ON REDAN ROAD, CORRECT?

A. THAT'S CORRECT.

Q. AND, NOW, YOU INDICATED THAT THE OCCUPANT OF THE VEHICLE ON THE PASSENGER'S SIDE, THE SEAT WAS RECLINED, CORRECT?

A. THAT'S CORRECT.

Q. AND WAS IT RECLINED SO THAT YOU DID NOT KNOW THE GENDER OF THE INDIVIDUAL IN THE VEHICLE?

A. THAT'S CORRECT.

Q. NOW, WHILE THE VEHICLE WAS ON REDAN ROAD DID YOU EVER OBSERVE IT VIOLATE ANY OF THE RULES OF THE ROAD, ANY TRAFFIC VIOLATIONS?

A. OTHER THAN THE SEAT BELT VIOLATION BY THE PASSENGER, NO.

Q. DO YOU REMEMBER TESTIFYING AT A PRELIMINARY HEARING OTHER THAN WHAT – I BEG YOUR PARDON?

A. OTHER THAN THE SEAT BELT VIOLATION.

Q. OKAY. WELL LET ME ADDRESS THAT, THEN: MY UNDERSTANDING THEN, FROM YOUR

RESPONSES, THAT THERE WERE NO MOVING VIOLATIONS THAT YOU OBSERVED, ALL YOU OBSERVED WAS THAT THE PASSENGER WAS NOT WEARING A SEAT BELT, CORRECT?

A. THAT'S CORRECT.

[14] Q. AND YOU SAID YOU DON'T KNOW IF THE DRIVER WAS WEARING A SEAT BELT, CORRECT?

A. I CAN'T RECALL.

Q. NOW, NOT BEING ABLE TO SEE THE PERSON RECLINED IN THE PASSENGER'S SEAT HOW DID YOU KNOW THAT THAT INDIVIDUAL WAS NOT WEARING A SEAT BELT?

A. THAT MAKE AND MODEL VEHICLE THE SEAT BELT IS A DOUBLE HARNESS WHICH COMES FROM UP ON THE SIDE OF THE VEHICLE AND YOU CAN SEE THE SEAT BELT – THE SEAT BELT IS ATTACHED – YOU CAN SEE ONE OF THE TWO ARMS COMING FROM UP ON TOP – ON THE TOP AND SIDE OF THE VEHICLE TO RECLINE –

Q. OKAY.

A. AND IT WAS NOT DOING IT.

Q. SO, YOUR OPINION IS THAT HE WAS NOT WEARING THE SEAT BELT.

DID YOU EVER PULL UP NEXT TO THE VEHICLE AND SEE IF PERHAPS, WHILE LYING IN THE SEAT, THAT THE SEAT BELT WAS UNDER THE PERSON'S ARM WHILE HE WAS LYING BACK?

A. NO, I DIDN'T.

Q. DID YOU DIRECT OFFICER BECKER TO STOP THE VEHICLE BECAUSE THE PASSENGER IN THAT VEHICLE WAS NOT WEARING HIS SEAT BELT?

A. NO.

Q. NOW, THE VEHICLE TURNED OFF OF REDAN ROAD ONTO – WHAT WAS IT – ALLGOOD?

[15] A. THAT'S CORRECT.

Q. AND YOU TESTIFIED EARLIER THAT THE VEHICLE ACCELERATED TO A SPEED IN EXCESS OF THE POSTED SPEED LIMIT, CORRECT?

A. THAT'S CORRECT.

Q. AT THE PRELIMINARY HEARING ON THIS MATTER DO YOU REMEMBER ME ASKING YOU WHETHER OR NOT YOU KNEW WHAT THE POSTED SPEED LIMIT WAS?

A. I DON'T RECALL.

Q. LET ME ASK YOU THIS. ON ALLGOOD ROAD DID YOU INSTRUCT OFFICER BECKER TO PULL THE VEHICLE OVER BECAUSE IT EXCEEDED THE SPEED LIMIT?

A. NO.

Q. DO YOU REMEMBER ME ASKING YOU AT THE PRELIMINARY HEARING:

"WHAT WAS THE SPEED LIMIT THAT WAS POSTED ON REDAN ROAD AND ALLGOOD ROAD? IF THEY ARE DIFFERENT TELL ME REDAN ROAD FIRST."

DO YOU REMEMBER ME ASKING YOU THAT?

A. I DON'T REMEMBER THAT.

Q. AND DO YOU REMEMBER YOUR RESPONSE:

"I DON'T RECALL."

A. I DON'T REMEMBER.

Q. LET ME SHOW YOU A COPY OF THE PRELIMINARY HEARING TRANSCRIPT AND I WILL DIRECT YOUR ATTENTION TO LINE 18.

A. OKAY.

[16] Q. DID YOU TESTIFY AT THE PRELIMINARY HEARING THAT YOU DIDN'T RECALL WHAT THE SPEED LIMIT WAS ON EITHER ALLGOOD OR REDAN ROAD?

A. YES.

Q. AND DO YOU KNOW TODAY WHAT THE SPEED LIMIT WAS?

A. I WILL HAVE TO LOOK AT THE – DEFINITELY, NO.

Q. WHEN YOU – NOW, WHEN YOU INDICATED THAT MR. – WAS WILSON THE DRIVER OF THE VEHICLE TO YOUR KNOWLEDGE?

A. YES.

Q. WHEN YOU OBSERVED THE VEHICLE ON REDAN ROAD YOU SAID THAT IT WAS DRIVING AT A SLOW RATE OF SPEED, IS THAT CORRECT?

A. CORRECT.

Q. DOES A SLOW RATE OF SPEED MEAN UNDER THE SPEED LIMIT?

A. I BELIEVE AT THE TIME I USED NOTICEABLY SLOW RATE OF SPEED, WHICH WOULD BE AT A RATE SLOWER THAN THE GENERAL MODE OF TRAFFIC TRAVELING ON THE ROAD AT THAT TIME.

Q. WELL, IN FACT, ISN'T IT TRUE, SIR, THAT YOU TESTIFIED AT THE PRELIMINARY HEARING THAT THERE WERE NO VEHICLES IN FRONT OF MR. WILSON'S VEHICLE AND THE REST OF THE TRAFFIC WAS BEHIND HIM FOLLOWING AT A CONSISTENT RATE OF SPEED?

A. CONSISTENT TO THE SPEED THAT HE WAS TRAVELING AT, YES.

Q. DID YOU TELL OFFICER BECKER TO PULL THE JEEP CHEROKEE OVER BECAUSE IT WAS DRIVING TOO SLOWLY ON REDAN ROAD?

A. NO.

Q. NOW, WHEN YOU RECEIVED THIS INFORMATION REGARDING THE [17] VEHICLE AND THE TIME OF THE TIP, WOULD IT BE FAIR TO SAY THAT WHEN YOU RECEIVED THE TIP YOU UNDERSTOOD THAT THE VEHICLE WAS IN THE AREA AT THE TIME THE TIP WAS GIVEN?

A. THAT WAS THE UNDERSTANDING THAT I HAD, YES.

Q. AND OTHER THAN DESCRIBING THE VEHICLE – ONE OTHER THING: YOU INDICATED I BELIEVE THAT YOUR UNDERSTANDING WAS THAT

THE OCCUPANTS OF THE VEHICLE WERE SUPPOSED TO BE TWO BLACK MALES, IS THAT CORRECT?

A. YES.

Q. DO YOU REMEMBER TESTIFYING AT THE PRELIMINARY HEARING THAT THE OCCUPANTS OF THE VEHICLE WERE SUPPOSED TO BE A BLACK INDIVIDUAL AND POSSIBLY A WHITE INDIVIDUAL?

A. I DON'T RECALL.

Q. YOU DON'T?

MR. WOLFE: IF I CAN JUST FIND THAT I WILL CONCLUDE IT, JUDGE.

THE COURT: WE ARE GOING TO TAKE A SHORT RECESS.

(WHEREUPON A BRIEF RECESS WAS TAKEN AT THIS POINT)

THE COURT: ALL RIGHT. I WILL REMIND YOU THAT YOU ARE STILL UNDER OATH.

MR. WOLFE.

MR. WOLFE: I WILL BE BRIEF.

Q. (BY MR WOLFE): DETECTIVE FRANKLIN, DO YOU REMEMBER ME ASKING YOU AT THE PRELIMINARY HEARING WHAT EXACTLY THE CONFIDENTIAL SOURCE SAID TO YOU? DO YOU REMEMBER ME ASKING YOU [18] THAT?

A. HUH-UH. I DON'T RECALL THAT.

Q. DO YOU REMEMBER EVER TESTIFYING AT THE HEARING THAT YOUR UNDERSTANDING WAS

THERE WILL BE AN EARLY TO MID '90'S MODEL WHITE CHEROKEE BEARING TAG 324 JLC THAT'S GOING TO BE AROUND COVINGTON HIGHWAY, REDAN ROAD AND HOLCOMBE ROAD?

"TWO MALES IN IT. WHITE OR BLACK MALES? PROBABLY BLACK MALES. THEY ARE GOING TO HAVE DOPE IN THE CAR."

A. I DON'T RECALL SAYING THAT.

Q. I WILL SHOW YOU LINES 12 THROUGH 19. IF YOU WILL REVIEW THAT TO REFRESH YOUR RECOLLECTION.

A. UH-HUH.

Q. HAVE YOU HAD AN OPPORTUNITY TO REVIEW THAT PORTION OF THE TRANSCRIPT?

A. YES.

Q. AND DOES IT REFRESH YOUR RECOLLECTION AS TO WHETHER OR NOT YOU SAID:

"TWO MALES IN IT. WHITE OR BLACK MALES? PROBABLY BLACK MALES."

DOES THAT REFRESH YOUR RECOLLECTION?

A. YES.

Q. AND DID YOU SAY THAT?

A. YES.

Q. NOW, DID THE CONFIDENTIAL SOURCE THAT YOU SPOKE WITH TELL YOU HOW HE KNEW THE INFORMATION HE SHARED WITH YOU?

[19] A. NO.

Q. DID HE SAY THAT THE INFORMATION WAS OF HIS OWN PERSONAL KNOWLEDGE?

A. NO.

Q. DID HE SAY WHERE THE JEEP WAS GOING?

A. NO.

Q. DID HE SAY WHAT DIRECTION THE JEEP WOULD BE TRAVELING IN?

A. NO.

Q. I KNOW I ASKED YOU ABOUT REDAN ROAD. I DON'T KNOW IF I ASKED ABOUT ALLGOOD BUT I WILL ASK THE QUESTION ABOUT THE TRAFFIC VIOLATIONS THERE.

DO YOU REMEMBER ME ASKING YOU:

"DID YOU OBSERVE THE JEEP FROM THE TIME IT LEFT REDAN ROAD AND TURNED ONTO ALLGOOD?"

DO YOU REMEMBER ME ASKING YOU THAT? DID YOU OBSERVE THE JEEP DO THAT, TURN FROM REDAN ONTO ALLGOOD?

A. YES.

Q. AND DO YOU REMEMBER TELLING ME THAT YOU DID NOT OBSERVE THE VEHICLE MAKE ANY TRAFFIC VIOLATIONS ON ALLGOOD ROAD?

A. I DON'T RECALL, BUT IT DID NOT.

Q. IT DID NOT?

A. I DID NOT OBSERVE ANY.

Q. SO, THE WAY I UNDERSTAND IT, YOU TOLD BECKER TO PULL OVER THE WHITE JEEP BECAUSE YOU VERIFIED THE INFORMATION THAT [20] HAD BEEN GIVEN YOU BY THE CONFIDENTIAL SOURCE?

A. THAT AND SUSPICIOUS. THAT AND WHICH THE DRIVER WAS ACTING, YES.

Q. YOU MEAN LOOKING IN HIS REAR VIEW MIRROR AND TURNING AROUND?

A. YES.

Q. AND YOU WERE IN AN UNMARKED POLICE VEHICLE?

A. YES.

Q. AND THE CONFIDENTIAL SOURCE DID NOT TELL YOU HOW HE KNEW THERE WAS COCAINE IN THE CAR?

A. CORRECT.

MR. WOLFE: THAT'S ALL THE QUESTION THAT I HAVE.

THE COURT: MR. JOHNSON?

MR. JOHNSON: YES, YOUR HONOR, JUST A FEW QUESTIONS.

CROSS EXAMINATION

BY MR. JOHNSON:

Q. OFFICER FRANKLIN, ONCE THE VEHICLE IN WHICH MY CLIENT, MR. VOGELSON, WAS A PASSENGER WAS PULLED OVER, DID YOU REMAIN AT THE SCENE FOR ANY LENGTH OF TIME?

A. NO, I DIDN'T.

Q. HOW LONG AFTER THE STOP DID YOU LEAVE THE SCENE?

A. AS OFFICER BECKER WAS ENGAGING THE VEHICLE I CONTINUED TO DRIVE – I WAS NOT THERE AT ALL DURING THE STOP.

MR. JOHNSON: I HAVE NO FURTHER QUESTIONS, YOUR HONOR. THANK YOU.

[21] THE COURT: ANYTHING FURTHER?

MS. DANIELS: NOTHING FURTHER.

THE COURT: ALL RIGHT, SIR, YOU ARE FREE TO GO.

(WHEREUPON, THERE BEING NO FURTHER QUESTIONS, THE WITNESS WAS EXCUSED AND WITHDREW)

MS. DANIELS: THE STATE CALLS OFFICER BECKER.

MR. WOLFE: MAY WE HAVE A CONFERENCE BEFORE OFFICER BECKER COMES IN, OUTSIDE THE WITNESS' PRESENCE?

THE COURT: YES. DON'T BRING MR. BECKER INTO COURT YET.

MR. WOLFE: I, BASED ON HIS RESPONSE WITH REGARD TO THE DISTINCTION BETWEEN A RELIABLE CONFIDENTIAL INFORMANT AND A CONFIDENTIAL SOURCE, AND HIS OPINION AS TO THAT, AND THE BASIS FOR HIS INVESTIGATION - I DIDN'T GO INTO THE OTHER TIMES THAT THE INFORMANT HAD PROVIDED INFORMATION TO HIM - I WOULD LIKE TO RESERVE THE RIGHT TO RECALL THE OFFICER SHOULD - I KNOW WF DON'T GET A - SHOULD -

THE COURT: NO MOTION TO DISMISS ON THE MOTION TO SUPPRESS. YOU HAD BETTER GET ALL YOU WANT TO GET FROM HIM NOW.

MR. WOLFE: WELL, I WILL JUST LEAVE IT. I DON'T THINK YOU CAN GET THAT - I'M SORRY.

THE COURT: BRING MR. BECKER IN, PLEASE.

S. M. BECKER,

A WITNESS CALLED ON BEHALF OF THE STATE, AFTER HAVING FIRST BEEN [22] DULY SWORN, TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION

BY MS. DANIELS:

Q. STATE YOUR NAME, PLEASE.

A. DETECTIVE S. M. BECKER, DEKALB -

Q. I'M SORRY. GO AHEAD.

A. DEKALB COUNTY POLICE DEPARTMENT, PRESENTLY ASSIGNED TO THE STRIKE FORCE.

Q. HOW LONG HAVE YOU BEEN ASSIGNED TO THE STRIKE FORCE UNIT?

A. EVER SINCE IT WAS CONCEIVED, I BELIEVE, IN 1998.

Q. BACK IN APRIL OF THIS YEAR WERE YOU CALLED OUT BY DETECTIVE R. L. FRANKLIN – SPECIFICALLY ON APRIL 26TH OF THIS YEAR WERE YOU CALLED OUT BY DETECTIVE R. L. FRANKLIN TO ASSIST HIM WITH AN INVESTIGATORY STOP?

A. YES, MA'AM.

Q. AND DID HE PROVIDE YOU WITH INFORMATION ABOUT WHY HE WAS INVESTIGATING THE PARTICULAR VEHICLE ON THIS DAY?

A. YES, MA'AM.

Q. AND DID HE GIVE YOU THE INFORMATION THAT HE HAD RECEIVED FROM THE CONFIDENTIAL SOURCE OR CONFIDENTIAL INFORMANT THAT HE HAD SPOKEN WITH?

A. NO. WHAT HE PROVIDED US WITH WAS A DESCRIPTION OF A VEHICLE, A LOCATION WHERE THE VEHICLE WAS TO BE AND THE OCCUPANTS IN THE VEHICLE.

[23] Q. DID HE –

A. I'M SORRY. ANYTHING ELSE, NO.

Q. DID HE GIVE YOU A SPECIFIC TAG NUMBER?

A. YES, MA'AM.

Q. DID YOU LOCATE THAT VEHICLE BACK ON APRIL 26, 1999, IN THE AREA OF ALLGOOD ROAD?

A. YES, MA'AM.

Q. WHAT DID YOU DO WHEN YOU FOUND THE VEHICLE?

A. AFTER I OBSERVED THE VEHICLE TRAVELING ON ALLGOOD ROAD I DROVE IN BEHIND THE VEHICLE AND I ENGAGED MY BLUE LIGHTS.

Q. OKAY.

A. THE VEHICLE TRAVELED A SHORT DISTANCE AND THEN IT DROVE INTO THE PARKING LOT ON ALLGOOD ROAD.

Q. PRIOR TO ENGAGING YOUR BLUE LIGHTS DID YOU CONFIRM THE TAG NUMBER WITH THE TAG NUMBER OF THE VEHICLE THAT YOU WERE LOOKING FOR?

A. I CONFIRMED SEVERAL THINGS. NOT ONLY THE TAG NUMBER BUT ALSO THE DESCRIPTION OF THE VEHICLE, WHICH WAS A WHITE JEEP, ALSO THE OCCUPANTS OF THE VEHICLE.

Q. WHAT HAPPENED AFTER YOU STOPPED THE WHITE GRAND CHEROKEE?

A. AFTER THE VEHICLE WAS DETAINED I GOT ON MY PUBLIC ADDRESS SYSTEM AND REQUESTED THE DRIVER OF THE VEHICLE, MR. WILSON, TO EXIT

THE VEHICLE AND TO PROCEED TO THE REAR OF THE VEHICLE.

[24] Q. WHY DID YOU CHOOSE TO GO BY WAY OF YOUR PUBLIC ADDRESS SYSTEM AS OPPOSED TO THE WALKING UP TO CAR?

A. IT WAS A SAFETY FACTOR.

Q. AND DID THE DRIVER OF THE CAR COMPLY?

A. YES, HE DID.

Q. AND WHAT HAPPENED AFTER HE GOT OUT OF THE CAR?

A. AFTER HE GOT OUT OF THE VEHICLE AND WAS POSITIONED AT THE REAR OF HIS VEHICLE I EXITED MY PATROL UNIT AND I APPROACHED HIM AND REQUESTED TO SEE HIS DRIVER'S LICENSE AND INSURANCE CARD.

Q. WAS HE ABLE TO PRODUCE THAT?

A. HE PRODUCED HIS DRIVER'S LICENSE AND HE STATED TO ME THAT HIS INSURANCE CARD WAS STILL INSIDE THE VEHICLE.

Q. WHAT DID YOU DO AFTER YOU OBTAINED HIS DRIVER'S LICENSE?

A. I ASKED HIM IF THE VEHICLE BELONGED TO HIM AND HE STATED THAT IT DID.

Q. WHAT HAPPENED NEXT?

A. I ASKED HIM IF THERE WERE ANY GUNS IN THE VEHICLE AND HE STATED THERE WERE.

Q. DID HE TELL YOU WHERE THE GUN WAS LOCATED?

A. HE STATED THAT IT WAS UP UNDER THE DRIVER'S SEAT.

Q. WHAT DID YOU DO AT THAT TIME?

A. HE WAS PATTED DOWN AND THEN I PROCEEDED TO THE DRIVER'S SIDE OF THE VEHICLE AND I GLANCED INSIDE. I WAS NOT ABLE TO [25] OBSERVE THE WEAPON SO I ENTERED THE VEHICLE AND I LOOKED UP UNDER THE DRIVER'S SEAT. UPON DOING SO I OBSERVED A WEAPON, ALSO A CLEAR PLASTIC BAG WITH SOME GREEN LEAFY MATERIAL WHICH I SUSPECTED TO BE MARIJUANA.

Q. AT THE TIME THAT YOU WENT UP TO THE CAR AFTER HE HAD INFORMED YOU THAT THERE WAS A WEAPON IN THE CAR WHERE WAS THE PASSENGER?

A. THE PASSENGER WAS STILL SEATED ON THE RIGHT SIDE OF THE VEHICLE.

Q. WHAT DID YOU DO ONCE YOU LOOKED UP UNDER AND YOU SAW THE WEAPON AND THE SUSPECTED MARIJUANA?

A. I RETRIEVED BOTH ARTICLES.

Q. DID YOU APPROACH MR. WILSON AGAIN?

A. YES, I DID.

AT THIS TIME I WAS ALSO JOINED BY DETECTIVE FRANK. HE WAS WITH ME AT THIS TIME.

Q. AND WHAT DID YOU DO WITH THE GUN AND THE NARCOTICS, OR THE MARIJUANA, THAT YOU GOT FROM THE VEHICLE?

A. I SECURED THEM.

Q. DID YOU APPROACH MR. WILSON AGAIN?

A. YES, I DID.

Q. AND WHAT, IF ANY, CONVERSATION DID YOU HAVE WITH HIM ABOUT THE GUN AND THE NARCOTICS?

A. I ASKED HIM IF THE WEAPON AND THE CONTRABAND, THE MARIJUANA, BELONGED TO HIM AND HE STATED THAT IT DID.

[26] Q. WHAT HAPPENED AFTER THAT?

A. HE WAS PLACED UNDER ARREST.

Q. AND WHAT, IF ANYTHING, DID YOU ALL DO AFTER YOU PLACED HIM UNDER ARREST?

A. AFTER HE WAS PLACED UNDER ARREST I REQUESTED DETECTIVE FRANK TO CONDUCT AN OPEN AIR SEARCH OF THE VEHICLE.

I WALKED AROUND TO THE PASSENGER'S SIDE AND REQUESTED THE PASSENGER TO EXIT THE VEHICLE AND STEP AWAY FROM IT.

Q. DID HE COMPLY?

A. YES, HE DID.

Q. WHEN YOU ARE TALKING ABOUT AN OPEN AIR SEARCH, HOW WAS THAT CONDUCTED?

A. DETECTIVE FRANK RETRIEVED HIS K-9 AND WALKED IT AROUND THE OUTSIDE OF THE VEHICLE.

Q. DID YOU OBSERVE HIM DOING THAT?

A. YES, I DID.

Q. WHAT DID THE K-9 – WHAT, IF ANYTHING, DID THE K-9 DO WHEN WALKING AROUND THE OUTSIDE OF THE VEHICLE?

A. THE K-9 ALERTED ON THE FRONT DRIVER'S SIDE AND ALSO THE FRONT PASSENGER'S SIDE OF THE VEHICLE.

Q. AND ON THE FRONT DRIVER'S SIDE IS WHERE YOU REMOVED THE SUSPECTED MARIJUANA, IS THAT CORRECT?

A. THAT'S CORRECT.

Q. HAD YOU AT THAT POINT REMOVED ANY FORM OF CONTRABAND FROM THE PASSENGER'S SIDE?

[27] A. NO.

Q. WHAT HAPPENED AFTER THE K-9 ALERTED ON THE PASSENGER'S SIDE OF THE CAR.

A. DETECTIVE –EXCUSE ME – K-9 ROY WAS ALLOWED TO ENTER THE VEHICLE. HE ALERTED ON A PACKAGE IN THE FRONT PASSENGER'S SIDE FLOOR BOARD AND ALSO IN THE BACK SEAT, PASSENGER'S SIDE, OF THE JEEP.

Q. DID YOU REMOVE THE – LET'S BACK UP: WHEN YOU SAY HE "ALERTED" –

A. HE GAVE AN INDICATION OF THE PRESENCE OF THE ODOR OF DRUGS.

Q. AND THIS K-9 IS TRAINED IN THE DETECTION OF –

A. COCAINE –

Q. – NARCOTICS?

A. RIGHT. ALL THE K-9'S ARE CERTIFIED IN THE DETECTION OF –

MR. WOLFE: I WILL OBJECT, EXCEPT TO SHOW HIS CONDUCT. I WILL OBJECT WITH REGARD TO THE TRUTH OF THE MATTER THAT HE IS ASSERTING NOW WITH REGARD TO THE DOG. HE IS SAYING THE ALERT IS WHAT PROMPTED HIM TO DO A FURTHER SEARCH. I THINK IT'S ADMISSIBLE BUT I THINK IT IS HEARSAY OTHERWISE.

MS. DANIELS: THE DOG ALERTING IS HEARSAY?

THE COURT: NO. CERTIFIED. HE IS QUESTIONING WHETHER OR NOT –

MS. DANIELS: I CAN LAY A FURTHER FOUNDATION. I WOULD [28] THINK THAT –

THE COURT: IF YOU THINK IT'S RELEVANT.

I WILL SUSTAIN THE OBJECTION TO THE EXTENT THAT HE IS SAYING THAT THE DOG IS CERTIFIED. I DON'T KNOW IF – HE CAN TESTIFY AS TO HOW HE KNOWS, IF HE CAN TESTIFY HOW HE KNOWS OR WHAT'S GOING ON – WHETHER HE CAN SAY THAT.

Q. THIS IS K-9 ROY, IS THAT CORRECT?

A. YES.

Q. HOW LONG HAS K-9 ROY BEEN WITH THE DEKALB COUNTY STRIKE FORCE?

A. APPROXIMATELY TWO YEARS.

Q. WHERE DID HE COME FROM?

A. HE CAME FROM A BREEDER IN ALABAMA.

Q. WHAT HAPPENED AFTER – WAS HE TRAINED BY THE ALABAMA BREEDER OR TAKEN TO SOMEONE SPECIAL FOR TRAINING?

A. HE WAS –

MR. WOLFE: WITHDRAW THE OBJECTION FOR PURPOSES OF THIS HEARING.

THE COURT: ALL RIGHT.

MS. DANIELS: OKAY.

Q. THIS PARTICULAR K-9, K-9 ROY, IS CERTIFIED AND TRAINED IN THE DETECTION OF NARCOTICS, IS THAT CORRECT?

A. THAT'S CORRECT.

Q. WHAT IS AN ALERT? HOW IS IT THAT YOU KNOW THEY ARE ALERTING?

[29] A. K-9 ROY HAS A PASSIVE ALERT WHEN HE DETECTS THE ODOR OF NARCOTICS. HE WILL SIT.

Q. AND WHAT DID HE DO WHEN HE ENTERED THE PASSENGER'S SIDE OF THIS CAR?

A. WHEN HE CONDUCTED THE OPEN AIR SEARCH ON THE OUTSIDE HE SAT TWICE AND THEN WHEN HE ENTERED THE VEHICLE HE SAT THREE TIMES, ONCE ON THE DRIVER'S SIDE AND ONCE ON THE PASSENGER'S SIDE AND ONCE IN THE REAR SEAT.

Q. AND YOU DESCRIBED A PACKAGE THAT WAS IN THE FRONT PASSENGER FLOOR BOARD, IS THAT CORRECT?

A. YES, MA'AM.

Q. DESCRIBE THAT FOR THE COURT, IF YOU WOULD.

A. IT WAS A WHITE, LIKE A GROCERY BAG, PLASTIC BAG, WHICH CONTAINED A – COCAINE INSIDE OF IT.

Q. AND THERE WERE – HOW MANY SEPARATE PACKAGES WERE THERE INSIDE THE GROCERY BAG?

A. THERE WAS THE GROCERY BAG ITSELF AND THEN I BELIEVE, THE BEST I CAN RECALL, A BAG INSIDE OF THAT, SO, THERE WERE ACTUALLY TWO.

Q. AFTER YOU UNCOVERED THE COCAINE THAT WAS IN THE FRONT PASSENGER'S DID YOU CONTINUE TO SEARCH INTO THE BACK OF THE CAR?

A. YES, MA'AM.

Q. WHAT DID YOU DISCOVER AND WHERE WAS IT?

A. THERE WAS A LARGE AMOUNT OF MARIJUANA THAT WAS UP UNDER THE BACK SEAT.

[30] Q. DID YOU HAVE TO PHYSICALLY REMOVE THE BACK SEAT OR WAS IT –

A. WE PHYSICALLY REMOVED THE BACK SEAT AND THE MARIJUANA WAS SITUATED UNDER THAT SEAT.

Q. TO YOUR KNOWLEDGE WAS A GRAM WEIGHT EVER OBTAINED ON THE COCAINE?

MR. WOLFE: OBJECT TO RELEVANCE.

MS. DANIELS: MORE INFORMATION FOR THE COURT.

THE COURT: DON'T NEED IT. EITHER A GOOD STOP OR NOT A GOOD STOP.

Q. DID YOU HAVE ANY FURTHER CONVERSATIONS WITH THE DRIVER OF THE CAR, MR. WILSON?

A. NO.

Q. DID YOU HAVE ANY CONVERSATION WITH THE PASSENGER, MR. VOGELSON?

A. NO, MA'AM.

Q. WAS HIS IDENTIFICATION OBTAINED AT SOME POINT?

A. THE PASSENGER?

Q. YES.

A. YES, MA'AM.

Q. IF YOU WOULD, OFFICER BECKER, IF YOU WILL TAKE A LOOK AROUND THE COURTROOM AND LET US KNOW IF YOU SEE THE FOLKS WHO WERE THE DRIVER AND THE PASSENGER OF THAT JEEP GRAND CHEROKEE BACK ON APRIL 26TH?

A. I BELIEVE THE DRIVER OF THE VEHICLE IS GOING TO BE THE [31] GENTLEMAN SEATED OVER THERE.

MS. DANIELS: YOUR HONOR, MAY THE RECORD REFLECT THAT HE HAS IDENTIFIED THE TWO OCCUPANTS OF THE VEHICLE ON THAT DAY.

THE COURT: ALL RIGHT.

MS. DANIELS: I HAVE NO FURTHER QUESTIONS AT THIS POINT.

CROSS EXAMINATION

BY MR. WOLFE:

Q. IS IT OFFICER OR AGENT?

A. IT'S DETECTIVE.

Q. DETECTIVE BECKER. OKAY. DETECTIVE, MY UNDERSTANDING IS THAT YOU WERE NOTIFIED BY DETECTIVE FRANKLIN THAT HE HAD RECEIVED A TIP FROM AN INFORMANT, CORRECT?

A. NO, SIR. THE ONLY THING THAT, IN REFERENCE TO THIS INCIDENT, THE ONLY INFORMATION THAT WE HAD RECEIVED, WAS IN REFERENCE TO THE VEHICLE, THE OCCUPANTS AND WHAT THE VEHICLE CONTAINED.

Q. OKAY.

A. AS FAR AS THE INFORMATION, WHERE THE INFORMATION CAME FROM, WE WERE NEVER INFORMED ON IT.

Q. WHEN YOU RECEIVED WHATEVER INFORMATION YOU RECEIVED FROM DETECTIVE FRANKLIN, WAS IT YOUR UNDERSTANDING THAT WHEN THE VEHICLE CAME INTO YOUR VICINITY THAT YOU WERE GOING TO STOP THAT VEHICLE?

[32] A. YES, SIR.

Q. NOW, WHEN THE VEHICLE CAME INTO YOUR VICINITY, I UNDERSTAND, THAT YOU FELL IN BEHIND IT, CORRECT?

A. CORRECT.

Q. AND ENGAGED YOUR EMERGENCY EQUIPMENT, BLUE LIGHTS?

A. YES, SIR.

Q. AND THE VEHICLE PULLED OVER INTO A CHURCH PARKING LOT?

A. YES, SIR.

Q. NOW, AT THAT TIME HAD YOU RECEIVED ANY INFORMATION WITH REGARD TO WEAPONS BEING IN THE VEHICLE?

A. NO, SIR.

Q. IF I UNDERSTAND YOUR TESTIMONY, YOU DIRECTED THE DRIVER OF THE VEHICLE TO GET OUT AND GO TO THE BACK OF THE VEHICLE?

A. YES, SIR. I REQUESTED HIM TO STEP FROM THE VEHICLE OVER MY PUBLIC ADDRESS SYSTEM.

Q. AND AT THE TIME THAT YOU ASKED HIM TO EXIT AND GO TO THE REAR OF HIS VEHICLE WAS HE FREE TO LEAVE THAT AREA?

A. NO, SIR.

Q. AND AS YOU APPROACHED HIM AND ASKED FOR HIS LICENSE, WHICH HE PROVIDED TO YOU, DID YOU THEN PAT HIM DOWN FOR WEAPONS?

A. HE WAS PATTED-DOWN A SHORT TIME AFTER I REQUESTED HIS DRIVER'S LICENSE.

Q. AND YOU FOUND NO WEAPONS?

A. NO, SIR.

Q. NO CONTRABAND?

[33] A. NO, SIR.

Q. AND WAS THERE ANYTHING ABOUT THE DRIVER'S LICENSE THAT YOU DEEMED TO BE IMPROPER?

A. NO, SIR.

Q. DID YOU DO ANYTHING – WELL – STRIKE THAT.

DID YOU INQUIRE OF MR. WILSON AS TO WHETHER OR NOT THERE WAS CONTRABAND IN THE VEHICLE?

A. YES, SIR.

Q. ARE YOU REFERRING TO WEAPONS?

A. WEAPONS.

THE COURT: ASKING HIM ABOUT DRUGS?

MR. WOLFE: I'M ASKING ABOUT DRUGS.

A. NO, SIR.

Q. AND IS IT TO YOUR KNOWLEDGE ILLEGAL TO HAVE A WEAPON IN A VEHICLE?

A. DEPENDING ON THE LOCATION OF THE WEAPON.

Q. OKAY. BUT I THINK YOU JUST TESTIFIED A MOMENT AGO YOU HAD NO INDICATION FROM DETECTIVE FRANKLIN THAT THERE WERE WEAPONS?

A. NO, SIR.

Q. SO, THE ANSWER WAS "NO" TO "DID YOU INQUIRE AS TO DRUGS IN THE VEHICLE?"

A. CORRECT.

Q. DID YOU ASK TO SEARCH THE VEHICLE?

A. NO, SIR.

[34] Q. THE MARIJUANA THAT WAS FOUND UNDERNEATH THE DRIVER'S SEAT OF THE VEHICLE WAS NOT IN PLAIN VIEW AS YOU LOOKED IN THE VEHICLE FROM THE OUTSIDE?

A. CORRECT.

Q. NOR WAS THE FIREARM?

A. CORRECT.

Q. AND YOU HAD TO OPEN THE DOOR TO THE VEHICLE, BEND DOWN AND LOOK UNDER THE SEAT TO OBSERVE EITHER OF THEM?

A. CORRECT.

Q. WAS THE MARIJUANA IN A CHARCOAL GRAY SMALL BAG?

A. I DON'T – A CHARCOAL GRAY BAG? I DON'T –

Q. WHAT KIND OF BAG WAS IT IN?

A. I BELIEVE IT WAS IN A PLASTIC BAG. I DON'T REMEMBER THE KIND THAT IT WAS IN.

Q. WAS IT OPAQUE OR COULD YOU SEE THROUGH IT?

A. I BELIEVE – YES I BELIEVE IT WAS TRANSPARENT.

Q. TRANSPARENT?

A. I BELIEVE.

Q. AND THAT BAG WOULD HAVE BEEN DIRECTED TO THE CRIME LAB FOR ANALYSIS, SO WHATEVER IT WAS – I KNOW YOU STOP AND DO A LOT OF WORK LIKE THIS – BUT WHATEVER IT WAS THAT BAG THAT CONTAINED THE SUSPECTED MARIJUANA WAS SENT TO THE CRIME LAB?

A. I BELIEVE IT WAS – I PERSONALLY DID NOT SEND IT BUT I WOULD ASSUME THAT IT WAS.

Q. AND THEN I GUESS IT WAS – DID MR. WILSON OR THE [35] OCCUPANT OF THE VEHICLE

PRIOR TO YOUR PUTTING MR. WILSON UNDER ARREST DO ANYTHING THAT WAS NOT COOPERATIVE WITH YOUR COMMANDS AND DIRECTIONS?

A. NO, SIR.

Q. AND BUT FOR THE DETECTIVE FRANKLIN TELLING TO YOU STOP THAT VEHICLE YOU WOULD NOT HAVE STOPPED THAT VEHICLE?

A. CORRECT.

Q. DID YOU OBSERVE THAT VEHICLE – NEVER MIND. THAT'S ALL I HAVE.

THE COURT: MR. JOHNSON.

MS. JOHNSON: YES, SIR.

CROSS EXAMINATION

BY MR. JOHNSON:

Q. DETECTIVE BECKER, HOW LONG AFTER YOU SIGNALED FOR THE CAR TO STOP WITH YOUR BLUE LIGHTS WAS IT BEFORE MR. VOGELSON WAS ASKED TO GET OUT OF THE CAR?

A. FROM THE TIME THAT VEHICLE WAS DETAINED OR FROM THE TIME THAT I GOT BEHIND IT.

Q. THE TIME THAT IT WAS DETAINED?

A. I WOULD SAY APPROXIMATELY FIVE MINUTES.

Q. DURING THE TIME – DURING THAT FIVE MINUTE TIME PERIOD WHAT WAS MR. VOGELSON, THE PASSENGER,DOING?

A. HE WAS JUST SITTING IN THE FRONT PASSENGER'S SEAT.

Q. WHAT WAS THE OTHER DETECTIVE, DETECTIVE – OR OFFICER FRANK, WHAT WAS HE DOING AT THAT TIME?

[36] A. HE WAS JUST SUPPORTING ME AT THAT TIME.

Q. WHAT WAS HE DOING TO SUPPORT YOU?

A. JUST OBSERVING.

Q. FROM WHAT POSITION?

A. HE WAS TO THE RIGHT OF THE VEHICLE THAT HAD BEEN DETAINED IN THE PARKING LOT.

Q. WAS HIS VEHICLE PARKED BEHIND YOURS?

A. NO, SIR. IT WAS TO THE RIGHT, ALMOST – NOT DIRECTLY IN FRONT BUT TO THE RIGHT OF THE JEEP THAT HAD BEEN DETAINED.

Q. I SEE. SO, HIS VEHICLE WAS IN FRONT OF THE JEEP, TO THE RIGHT?

A. CORRECT, YES, SIR. NOT DIRECTLY IN FRONT BUT OFFSET TO THE RIGHT.

Q. POINTED IN THE SAME DIRECTION?

A. I BELIEVE THAT IT WAS POINTED MORE AT AN ANGLE THAN IT WAS DIRECTLY IN FRONT OF IT.

Q. OKAY. AND DURING THAT FIVE MINUTE PERIOD WAS OFFICER FRANK INSIDE OR OUTSIDE OF HIS CAR?

A. HE WAS OUTSIDE, SIR.

Q. HE WAS OUTSIDE OF HIS CAR?

A. YES, SIR.

Q. AND WAS HE CLOSE TO YOUR POSITION? WAS HE CLOSER TO YOU OR WAS HE CLOSER TO THE PASSENGER?

A. I WAS PROBABLY – HE WAS TO THE RIGHT OF THE JEEP. AS FAR AS BEING CLOSER TO THE PASSENGER OR TO ME, I WAS RELATIVELY [37] MOVING AROUND AND SO WHETHER OR NOT – CLOSER TO THE PASSENGER THAN HE WAS TO ME BECAUSE OF MY MOVEMENT.

Q. HOW CLOSE TO THE PASSENGER WAS HE DURING THAT FIVE MINUTES?

A. I WOULD SAY 10 OR 15 FEET.

Q. AND WAS HE HAVING ANY DIALOGUE WITH THE PASSENGER?

A. NO, I DON'T BELIEVE SO.

Q. NOW, WHO WAS IT THAT ORDERED MR. VOGELSON TO GET OUT OF THE CAR?

A. I DID.

Q. WHY DID DO YOU THAT?

A. BECAUSE OF THE K-9.

Q. THE K-9 HAD DONE WHAT TO CAUSE YOU TO ASK MR. VOGELSON TO STEP OUT?

A. I REQUESTED HIM TO EXIT THE VEHICLE SO THE K-9 WAS ABLE TO CONDUCT THE OUTSIDE SNIFF OF THE VEHICLE.

Q. I SEE. AND WHEN YOU ASKED HIM TO STEP OUT WHERE WAS OFFICER FRANK AT THAT TIME?

A. I BELIEVE AT THAT TIME HE WAS EN ROUTE TO A TREE WITH HIS K-9.

Q. NOW, AT SOME POINT MR. VOGELSON WAS NOT FREE TO LEAVE, IS THAT CORRECT?

A. THAT'S CORRECT.

Q. WAS THIS AT THE TIME THAT YOU FIRST STOPPED THE CAR?

A. YES, SIR.

[38] Q. AND WHEN HE WAS TAKEN OUT OF THE CAR AFTER ABOUT FIVE MINUTES MR. – THE CO-DEFENDANT WAS ALREADY UNDER ARREST AT THAT TIME?

A. MR. WILSON?

Q. YES.

A. YES.

Q. HE HAD ALREADY BEEN HANDCUFFED?

A. I DON'T KNOW IF HE HAD BEEN HAND-CUFFED AT THAT TIME BUT I HAD PLACED HIM UNDER ARREST.

Q. AND WHEN YOU – AND IT WAS YOU THAT APPROACHED THE PASSENGER'S SIDE OF THAT VEHICLE, IS THAT RIGHT?

A. YES, SIR.

Q. AND YOU OPENED THE DOOR?

A. I BELIEVE I DID OPEN THE DOOR.

Q. AND YOU HAD YOUR WEAPON IN YOUR HAND AT THAT TIME?

A. OH, NO, SIR.

Q. YOU DID NOT?

A. NO, SIR.

Q. AND YOU ORDERED MR. VOGELSON OUT OF THE CAR?

A. CORRECT.

Q. AND WHAT DID YOU TELL HIM TO DO ONCE HE WAS OUTSIDE?

A. STEP AWAY FROM THE VEHICLE.

Q. NOW, AT THAT POINT OFFICER FRANK WAS RETURNING TO THE VEHICLE WITH HIS DOG?

A. HE WAS IN THE PROCESS OF RETRIEVING HIS DOG AND [39] BRINGING HIS K-9 OVER TO CONDUCT THE OPEN AIR SEARCH OF THE JEEP.

Q. WAS HIS WEAPON DRAWN AT THAT TIME?

A. NO, SIR.

Q. WHERE WAS MR. WILSON WHILE THAT WAS GOING ON?

A. HE WAS – WE SITUATED HIM IN THE PARKING LOT OVER TO THE RIGHT SIDE OF MY VEHICLE.

Q. AND WAS HE IN HANDCUFFS AT THAT TIME?

A. I DON'T RECALL.

Q. NOW, ONCE YOU ORDERED MR. VOGELSON TO EXIT THE VEHICLE YOU PLACED HANDCUFFS ON HIM?

A. I DIDN'T.

Q. OFFICER FRANK PUT HANDCUFFS ON HIM?

A. I DON'T BELIEVE HE WAS IN HANDCUFFS WHEN HE WAS REQUESTED TO EXIT.

Q. AT WHAT POINT WERE HANDCUFFS PUT ON MR. VOGELSON?

A. AFTER THE CONTRABAND IN THE FRONT SEAT WAS LOCATED, I BELIEVE.

Q. DID YOU SPEAK TO MR. VOGELSON OTHER THAN TO TELL HIM TO GET OUT OF THE CAR –

A. NO.

Q. – PRIOR TO HIM BEING PLACED IN HANDCUFFS?

A. NO, SIR.

Q. DO YOU RECALL OFFICER FRANK SPEAKING WITH HIM AT ANY TIME?

[40] A. NO, SIR.

Q. DID HE OR DID HE NOT SPEAK WITH HIM?

A. I DON'T RECALL.

Q. HOW LONG AFTER MR. VOGELSON EXITED THE CAR WAS THERE – HOW LONG TRANSPIRED, HOW MUCH TIME TRANSPIRED BEFORE HE WAS ACTUALLY PLACED IN HANDCUFFS?

A. PROBABLY IT TOOK TWO TO THREE MINUTES FOR THE DOG TO COMPLETE THE SEARCH OF THE VEHICLE. IT WAS PROBABLY THAT TIME PERIOD OF ABOUT THREE MINUTES.

Q. ONCE THE DOG WAS INSIDE THE VEHICLE WHAT HAPPENED?

A. THE DOG CONDUCTED A SEARCH OF THE INTERIOR. AFTER THE ALERTS HAD BEEN DOCUMENTED DETECTIVE FRANK PLACED HIS DOG BACK IN THE CAR.

Q. WHAT DID YOU THEN DO?

A. THEN WE PLACED THE PASSENGER UNDER ARREST.

Q. AND WAS IT YOU THAT SEIZED SOMETHING FROM THE CAR?

A. YES, SIR.

Q. AS THE RESULT OF THE DRUG DOG GOING INSIDE THE CAR?

A. YES, SIR. WHAT I DID WAS I WENT AHEAD AND PHOTOGRAPHED THE CONTRABAND IN THE

VEHICLE, SEIZED IT AND THEN I TURNED IT OVER TO DETECTIVE FRANK.

Q. WAS THERE ANY IDENTIFICATION INSIDE THIS WHITE BAG, THIS WHITE PLASTIC BAG THAT YOU SPOKE OF EARLIER?

A. I DON'T BELIEVE SO, SIR.

Q. NOW, THIS WHITE PLASTIC BAG WAS LOCATED WHERE INSIDE [41] THE CAR?

A. ON THE FRONT PASSENGER'S FLOOR BOARD.

Q. AND THE CONTENTS OF THE BAG WERE NOT VISIBLE TO YOU STANDING OUTSIDE OF THE CAR?

A. NO, SIR.

Q. YOU HAD TO ACTUALLY TAKE THE PACKAGE OUTSIDE OF THE CAR AND LOOK INTO IT?

A. YES, SIR.

Q. AND ONCE YOU LOOKED INTO THIS WHITE PLASTIC BAG WHAT WAS THE FIRST THING THAT YOU SAW?

A. I BELIEVE THE WHITE SUBSTANCE. I BELIEVE IT WAS THE COCAINE.

Q. ISN'T IT A FACT, SIR, THAT INSIDE THE WHITE PLASTIC BAG WAS A – WERE TWO OBJECTS WRAPPED IN NEWSPAPER?

A. YES, SIR.

Q. AND, SO, YOU COULD NOT SEE WHAT WAS INSIDE OF THE NEWSPAPER?

A. NO, SIR.

Q. SO, YOU HAD TO UNWRAP THE NEWSPAPER?

A. CORRECT.

Q. AND ONCE YOU UNWRAPPED THE NEWSPAPER THEN YOU SAW A SUBSTANCE INSIDE OF ANOTHER BAG, IS THAT CORRECT?

A. YES, SIR.

Q. IT WAS A BLUE CLEAR PLASTIC BAG?

A. I DON'T REMEMBER THE EXACT CONTENTS THAT THE COCAINE [42] WAS WRAPPED IN BUT EVENTUALLY WE WERE ABLE TO DISCOVER THAT IT WAS, IN FACT, COCAINE.

Q. DID ANYBODY ASK FOR PERMISSION TO SEARCH INSIDE THAT BAG?

A. NO, SIR.

Q. AT WHAT POINT DID YOU – LET ME ASK YOU SOMETHING: WHEN YOU FIRST ASKED MR. VOGELSON TO STEP OUT OF THE CAR YOU FRISKED HIM AT THAT TIME, IS THAT CORRECT?

A. I DON'T RECALL. I'M SURE THAT HE WAS PATTED-DOWN.

Q. YOU NEVER CITED MR. VOGELSON FOR ANY VIOLATION, DID YOU, OTHER THAN TRAFFICKING IN COCAINE?

A. NO, SIR. THAT'S JUST THE ONE CHARGE.

Q. HAVE YOU EVER HEARD ANYTHING ABOUT A SEAT BELT VIOLATION INVOLVING EITHER ONE OF THE OCCUPANTS OF THAT VEHICLE?

A. DID I CHARGE HIM WITH A SEAT BELT VIOLATION? IS THAT YOUR QUESTION?

Q. YES.

A. NO, SIR.

MR. JOHNSON: NO FURTHER QUESTIONS, YOUR HONOR.

RE-DIRECT EXAMINATION

BY MS. DANIELS:

Q. AT THE TIME YOU SAW THE VEHICLE AND YOU TURNED ON YOUR BLUE LIGHTS, WAS IT YOUR INTENTION AT THAT POINT TO, ONCE YOU STOPPED THEM, TO ARREST THE TWO OCCUPANTS OF THE VEHICLE?

A. NO.

[43] Q. HOW WOULD YOU DESCRIBE WHAT THIS WAS, WHENEVER YOU PULLED THEM OVER? WERE THEY FREE TO GO?

A. NO.

Q. OKAY.

A. IT WAS AN INVESTIGATORY STOP.

Q. ONCE YOU – WHEN YOU WERE TALKING WITH MR. WILSON BEFORE ANY SEARCH BEING

CONDUCTED AT THAT POINT WAS HE PLACED UNDER ARREST –

A. NO.

Q. – BEFORE YOU WENT TO THE CAR?

A. NO.

Q. WHY DID YOU ASK ABOUT THE GUN?

A. FOR SAFETY.

Q. IS IT YOUR PRACTICE TO ASK ABOUT –

A. YES. IN THE VAST MAJORITY OF CASES THAT WE ARE INVOLVED IN WHERE THIS TYPE OF INCIDENT OCCURS WE ALWAYS ASK IF THERE IS A WEAPON IN THE CAR.

Q. AND THIS IS TO HELP INSURE YOUR SAFETY?

A. ABSOLUTELY.

Q. OKAY.

A. I MEAN IF YOU EVEN – BECAUSE OF THE INFORMATION THAT WE RECEIVED AND BECAUSE OF INCIDENTS THAT HAVE OCCURRED IN THE PAST WE HAVE FOUND THAT WEAPONS HAVE BEEN INVOLVED IN THIS TYPE OF INVESTIGATION AND THAT WAS THE REASON FOR THE PUBLIC ADDRESS SYSTEM.

[44] Q. AND AT THE TIME THAT YOU PULLED THE CAR OVER IT WAS YOUR BELIEF THERE WAS A LARGE AMOUNT OF NARCOTICS IN THE CAR?

A. THAT WAS THE INFORMATION THAT WE RECEIVED.

MS. DANIELS: THANK YOU VERY MUCH.

RE-CROSS EXAMINATION

BY MR. WOLFE:

Q. ROY, THE DOG, AND DETECTIVE FRANK HAD BEEN SUMMONED TO THAT LOCATION PRIOR TO THE VEHICLE ARRIVING, CORRECT?

A. CORRECT.

Q. AND THE PURPOSE OF THAT VEHICLE BEING THERE IS SO THAT ROY CAN CONDUCT WHAT YOU DESCRIBED AS AN OPEN AIR SEARCH OF THE VEHICLE?

A. WELL, I ALSO HAVE A K-9 BUT DETECTIVE FRANK'S K-9 CONDUCTED THE VEHICLE SNIFF.

Q. SO THAT'S WHAT THE DOG WAS THERE FOR?

A. CORRECT.

Q. AND AFTER YOU PATTED-DOWN MR. WILSON STANDING AT THE REAR OF HIS VEHICLE DID YOU ASK HIM ANY QUESTIONS ABOUT THE INFORMATION THAT HAD BEEN RECEIVED BY YOU REGARDING CONTRABAND DURING THE INVESTIGATIVE PORTION OF YOUR STOP?

A. I HADN'T GOTTEN TO THAT POINT YET.

Q. SO, YOU KNEW HE WAS STANDING AT THE REAR OF THE VEHICLE?

A. CORRECT.

Q. AND THAT HE WAS NOT ARMED?

[45] A. CORRECT.

Q. AND YOU DID NOT ENGAGE HIM IN CONVERSATION OTHER THAN OF AN INVESTIGATORY NATURE WITH REGARD TO THE INFORMATION THAT YOU HAD RECEIVED?

A. I HADN'T REACHED THAT POINT, THAT'S CORRECT.

Q. SO, YOUR ANSWER WOULD BE NO, YOU DID NOT?

A. WELL, THE ANSWER WOULD BE NO, AND THE REASON WHY IS BECAUSE OF THE CIRCUMSTANCES THAT DEVELOPED AT THAT POINT OF THE INVESTIGATION, TO WHERE HE SAID THAT THERE WAS A WEAPON IN THE VEHICLE. IF THERE WOULD HAVE BEEN AN ANSWER OF "NO", THEN THE INVESTIGATION WOULD HAVE CONTINUED IN REFERENCE TO THE QUANTITY – OR THE CONTENTS OF THE VEHICLE.

Q. AND WOULD THE DOG HAVE BEEN EMPLOYED IN THAT SORT OF THING?

A. THERE IS A POSSIBILITY THAT IT WOULD HAVE BEEN. I WOULD SAY, YES, MORE THAN LIKELY IT WOULD HAVE BEEN.

Q. BUT FOR THE GUN QUESTION –

A. CORRECT. ONCE THE GUN QUESTION HAD BEEN ASKED AND THE EVENTS THAT LEAD UP TO

HIM BEING PLACED UNDER ARREST AT THAT TIME, AND THEN I DID NOT INVOLVE – OR I DID NOT ENGAGE IN ANY TYPE OF CONVERSATION WITH MR. WILSON WITH REFERENCE TO THE INFORMATION THAT I RECEIVED FROM DETECTIVE FRANK.

MR. WOLFE: THANK YOU.

THE COURT: ANYTHING FURTHER?

MR. JOHNSON: NOTHING, YOUR HONOR.

[46] THE COURT: OKAY. YOU MAY STEP DOWN.

(WHEREUPON, THERE BEING NO FURTHER QUESTIONS, THE WITNESS WAS EXCUSED AND WITHDREW)

MS. DANIELS: THE STATE RESTS.

THE COURT: DOES THE DEFENSE HAVE ANY EVIDENCE?

MR. WOLFE: NO, YOUR HONOR.

MR. JOHNSON: NONE, YOUR HONOR.

THE COURT: LET ME ASK THE QUESTION, THE KIND OF QUESTION THAT – THE PRELIMINARY QUESTION – WE KIND OF JUMPED INTO THIS BECAUSE OF THE PRETRIALS WE WERE DOING: STANDING. I ASSUME MR. WILSON HAS STANDING, HIS AUTOMOBILE APPARENTLY.

WHAT IS YOUR CLIENT'S STANDING, MR. JOHNSON?

MR. JOHNSON: YOUR HONOR, WITHOUT WAIVING ANY STANDING THAT WE HAVE, MAY

HAVE WITH RESPECT TO THE AUTOMOBILE STOP, I WOULD VENTURE TO INFER TO THE COURT, MR. VOGELSON, FOR THE PURPOSE OF THIS HEARING, WOULD CLAIM A POSSESSORY INTEREST.

THE COURT: I JUST WANT TO MAKE THAT CLEAR. OBVIOUSLY THE STATE CAN'T USE THAT AT THE TRIAL UNLESS HE TESTIFIES, YOU UNDERSTAND, IF HE TESTIFIES.

MR. JOHNSON: WELL, FOR PURPOSES OF THIS HEARING, YOUR HONOR.

THE COURT: BUT HE CAN'T – YOU NEED TO UNDERSTAND HE CAN'T GET ON THE STAND AND TESTIFY CONTRARY AT TRIAL. THEY CAN'T USE IT IN THE MAIN PART OF THE CASE BUT – THE WAY I [47] UNDERSTAND IT, HE CAN'T GET ON THE STAND AND SAY "THEY AREN'T MY DRUGS". BECAUSE OTHERWISE – IF HE SAYS THEY ARE NOT HIS DRUGS HE HAS TO SAY IT NOW OR HE DOESN'T HAVE ANY STANDING. IT'S ONE OF THOSE WONDERFUL CATCH 22'S, YOU HAVE TO MAKE YOUR CHOICE NOW, EITHER CLAIM A POSSESSORY INTEREST IN THE DRUGS FOR THE PURPOSES OF THE SEARCH MOTION OR IF YOU DON'T CLAIM POSSESSORY INTEREST IN THE DRUGS AND HE IS NOT THE OWNER OF THE AUTOMOBILE, THEN HE DOESN'T HAVE ANY STANDING.

MR. JOHNSON: WE CERTAINLY ARE NOT GOING TO STIPULATE THAT HE, IN FACT, POSSESSED THE DRUGS, BUT JUST FOR THE PURPOSES OF –

THE COURT: YOU CAN'T HAVE IT BOTH WAYS. YOU HAVE TO HAVE ONE OR THE OTHER.

MR. JOHNSON: IF WE CAN'T, YOUR HONOR, THEN, YOU KNOW, I WILL ABIDE BY THE COURT'S RULING BUT I WILL OBJECT TO IT.

THE COURT: IF YOU HAVE SOME CASE LAW ON IT – I UNDERSTAND FROM THE CASE AUTHORITIES – I JUST GOT THROUGH DOING ONE OF THESE ABOUT TWO DAYS AGO WHERE I LOOKED AT THE LAW AND I CONVINCED MYSELF THAT UNLESS YOU HAVE GOT AN EXPECTATION OF PRIVACY BECAUSE OF THE OWNERSHIP OR SOMETHING LIKE THAT, IF YOUR A PASSENGER IN AN APARTMENT COMPLEX OR A MOTEL ROOM OR IF YOU ARE A MERE PASSENGER YOU HAVE GOT TO CLAIM SOME POSSESSORY INTEREST IN THE CONTRABAND, OTHERWISE YOU DON'T HAVE STANDING, UNLESS – IF YOU HAVE SOME CASE [48] AUTHORITY THAT TELLS ME DIFFERENTLY. I AM ALWAYS WILLING TO LISTEN, BUT THAT'S MY UNDERSTANDING.

MR. JOHNSON: I'M NOT DISAGREEING WITH THAT, YOUR HONOR, BUT I WOULD LIKE TO, FOR PURPOSE OF THIS HEARING ONLY, TO CLAIM POSSESSORY INTEREST IN THE –

THE COURT: I TOLD YOU YOU CAN'T DO IT BOTH WAYS. YOUR CLIENT SAYS HE HAD A POSSESSORY INTEREST IN THIS AND HE WANTS A RULING ON THE MOTION TO SUPPRESS, OR HE DOESN'T KNOW ANYTHING ABOUT THESE DRUGS, HE DOESN'T KNOW WHAT WE ARE TALKING ABOUT

AND IN WHICH CASE HE DOESN'T HAVE ANY STANDING.

MR. JOHNSON: WELL, IF THE COURT RULES HE DOESN'T HAVE STANDING – IF THE COURT IS RULING THAT HE DOES NOT HAVE STANDING, WITHOUT THE STIPULATION THAT THE BAG –

THE COURT: DOES YOUR CLIENT CLAIM POSSESSORY INTEREST IN THE CONTRABAND –

THE STATE CAN'T INTRODUCE THAT AS EVIDENCE. THEY CAN, HOWEVER, IMPEACH YOUR CLIENT IF HE GETS ON THE STAND AND SAYS, "THAT'S NOT MY STUFF." THEY CAN SAY, "WAIT A MINUTE, YOU CAN'T TESTIFY BOTH WAYS". BUT THE STATE CAN'T USE IT IN THEIR CASE IN CHIEF. THEY CAN ONLY USE IT FOR IMPEACHMENT.

MR. JOHNSON: YOUR HONOR, WE WILL NOT CLAIM ANY INTEREST IN THE BAG WHICH CONTAINED THE PURPORTED COCAINE.

THE COURT: OKAY.

NOW, LET ME MAKE SURE I UNDERSTAND WHAT IT WAS [49] SPECIFICALLY, MR. WOLFE, SINCE YOU ARE THE ONLY ONE LEFT, WHAT IS IT THAT YOU ARE SPECIFICALLY COMPLAINING ABOUT? THE MARIJUANA THAT WAS UNDER THE FRONT SEAT NEXT TO THE WEAPON, THE COCAINE, ALL OF IT, NONE OF IT?

MR. WOLFE: OKAY. NOW, AFTER HAVING HEARD EVERYBODY'S TESTIMONY HERE, AND I THINK I WAS PRETTY SPECIFIC IN MY AMENDED MOTION, I'M SAYING THAT THE – THERE WAS NOT

AN ARTICUABLE SUSPICION TO STOP THE VEHICLE. NUMBER 1.

NUMBER 2, I'M SAYING NOW THAT EVEN IF THERE WAS AN ARTICUABLE SUSPICION TO STOP THE VEHICLE, THAT THERE WAS AN ILLEGAL SEARCH, A WARRANTLESS SEARCH, THAT ANY STATEMENTS HE MADE TO THE OFFICER, WE HAVE NO TESTIMONY ABOUT MIRANDA; FOR EXAMPLE, "THAT'S MY GUN AND THAT'S MY CAR", OR WHATEVER. SO, STATEMENTS, CONTRABAND AND WEAPON FOUND IN THE VEHICLE, I AM SAYING SHOULD BE SUPPRESSED.

THE COURT: BASED ON THE FACT THAT IT WAS AN ILLEGAL STOP?

MR. WOLFE: YES, THERE WAS AN ILLEGAL STOP. PARTICULARLY BASED ON THE ISSUES I READ BRIEFLY. BUT EVEN IF THERE WAS AN ARTICUABLE SUSPICION THAT WARRANTED AN INVESTIGATORY STOP, I'M SAYING THAT THERE WAS A WARRANTLESS SEARCH OF HIS VEHICLE IN THAT THEY DIDN'T PROCEED IN AN EFFORT TO INVESTIGATE THE INFORMATION THAT THEY HAD.

THE COURT: HE ASKED – THE EVIDENCE THAT I HAVE IS THAT HE ASKS YOUR CLIENT, "ANY WEAPONS IN THE CAR?" WE HAVE GOT [50] MR. VOGELSON STILL SITTING IN THE CAR. HE SAYS, "ANY WEAPONS IN THE CAR?"

HE SAYS, "YES, THERE'S A GUN UNDERNEATH THE SEAT." HE GOES AND FINDS THE GUN.

FIRST OF ALL IT'S A CONCEALED WEAPON. SECONDLY HE SEES SOMETHING THAT HE SUSPECTS IS AND HE ARRESTS HIM BASED ON THAT.

MR. WOLFE: WELL, YES, I MEAN, I UNDERSTAND WHAT YOU ARE SAYING THERE. NUMBER 1, WHEN HE HAD HIM OUTSIDE OF THE VEHICLE AFTER THE STOP, IF THERE WAS A BASIS FOR IT, I DON'T BELIEVE THAT HE HAD THE RIGHT AT THAT POINT. THERE WAS NO INDICATION THAT HE WAS IN DANGER. HE TESTIFIED THAT HE DID NOT HAVE HIS WEAPON OUT. I MEAN THE POINT I MAKE IS CERTAINLY EVERY POLICE OFFICER CAN SAY, AND THERE ARE CASES THAT SAY JUST BECAUSE OF – CAN I ANALOGIZE TO A NO KNOCK SEARCH – EVERY SEARCH OF A HOME WHERE YOU HAVE A SEARCH WARRANT FOR DRUGS DOESN'T MEAN THAT YOU CAN GO IN AND YOU ARE AUTOMATICALLY ENTITLED TO A NO KNOCK ENTRY BECAUSE DRUGS AND GUNS ARE OFTEN TIMES SYNONYMOUS. I MEAN THE CASE LAW IS REPLETE ON THAT.

SO, I'M SAYING WHEN HE STOPPED HIM AND DETAINED HIM, ORDERED HIM OUT OF THE VEHICLE, PATTED HIM DOWN AND KNEW THAT HE WAS NOT ARMED AND THAT THERE WAS NO DANGER AT THAT POINT, THE FIRST QUESTION THAT HE ASKED WAS, "IS THERE A GUN IN THE VEHICLE?" NUMBER 1, THERE IS NOTHING WRONG WITH [51] HAVING A GUN IN THE VEHICLE. THEN HE SAID, "WHERE IS THE GUN?" AND AT THAT POINT HE ANSWERED, "UNDER THE SEAT."

NOW, CERTAINLY I AGREE WITH YOU THAT IT IS ILLEGAL TO HAVE A GUN UNDER THE SEAT IN YOUR VEHICLE. SO, IF THEY GET TO THE CAR, I THINK THE SEARCH OF THE CAR – AND THE QUESTIONS WERE DESIGNED TO INSTIGATE A SEARCH OF THE VEHICLE. NOTHING WAS ASKED WITH REGARD TO THE INVESTIGATION OF THE INFORMATION THAT THEY HAD RECEIVED. SO, IF WE GET THERE. I MEAN, I'M NOT GOING TO –

THE COURT: YES. LET ME HEAR FROM THE STATE – WELL WHY DON'T YOU MAKE YOUR ARGUMENT AT ONE TIME.

MR. WOLFE: I'D LIKE TO HEAR HER, IF YOU DON'T MIND.

THE COURT: I WILL GIVE YOU A CHANCE TO REBUT. JUST TELL ME – GIVE ME ALL THE REASONS WHY YOU THINK I OUGHT TO SUPPRESS THIS AND THEN I WILL GIVE YOU A CHANCE TO REBUT.

(WHEREUPON, ARGUMENT OF COUNSEL WERE HEARD AT THIS POINT)

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[52] – CERTIFICATE –

I HEREBY CERTIFY THAT THE WITHIN AND FOREGOING CONSTITUTES A TRUE, CORRECT AND COMPLETE TRANSCRIPT OF THE PROCEEDINGS HAD ON THE HEARING ON THE MOTION TO SUPPRESS IN THE MATTER OF THE STATE OF GEORGIA VERSUS DAMON WILSON AND OWEN VOGELSON,

IN DEKALB SUPERIOR COURT, INDICTMENT NO. 99-CR-3755, WHICH WAS HEARD BY SAID COURT AT ITS SEPTEMBER TERM, 1999, AND MORE PARTICULARLY ON OCTOBER 20, 1999, WITHOUT THE INTERVENTION OF A JURY.

THIS THE 20TH DAY OF JULY, 2000.

/s/ Lawson Thigpen
LAWSON THIGPEN
CERTIFIED COURT
REPORTER, NO. A-187
DEKALB SUPERIOR COURT